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Supreme Court of the United States

OCTOBER TERM 1968

DARLINGTON MANUFACTURING COMPANY,
Petitioner,

v.

NATIONAL LABOR RELATIONS BOARD, *Respondent.*

PETITION OF DARLINGTON MANUFACTURING COMPANY FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT.

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November 8, 1968

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Petitioner, Darlington Manufacturing Company (hereinafter "Darlington"), petitions the Court for a writ of certiorari to review a decree of the United States Court of Appeals for the Fourth Circuit upholding a decision by the National Labor Relations Board (hereinafter "the Board") that Darlington, in liquidating its only plant and terminating permanently its corporate existence, violated section 8(a)(3) of the National Labor Relations Act.

Opinions Below

The majority and minority opinions of the Court of Appeals are reported at 397 F. 2d 760 and appear at the beginning of the Appendix accompanying this petition.[1]

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[1] The Appendix is a joint Appendix accompanying both this petition and the separate petition of Deering Milliken, Inc., seeking review of the same judgment.

The decision and order of the Board (165 NLRB No. 100) appear in the Appendix beginning at page 41a. This Court's previous opinion in this case is reported at 380 U.S. 263. The Court of Appeals' earlier opinion previously vacated by this Court is reported at 325 F. 2d 682. The Board's first decision and order are reported at 139 NLRB 241.

Jurisdiction

The decree of the Court of Appeals was entered on May 31, 1968. A timely petition for rehearing was denied by that court on August 29, 1968. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

Questions Presented [2]

1. Whether the Board properly applied the rule of law previously laid down by the Court in this case by holding that a company faced with substantial losses violated section 8(a)(3) of the National Labor Relations Act by liquidating its only plant and permanently terminating its own corporate existence, merely on the basis of a finding that the motive of a single officer and director, owning less than five per cent of the corporation's stock, in proposing liquidation of the business was, in part, to chill unionism in other plants, with no finding that his motive was communicated to the other directors and stockholders or that he dominated or controlled their decision.

2. Whether the Court of Appeals may sustain the Board's order on the basis of findings not made by the Board.

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[2] To avoid unduly lengthening these petitions Darlington does not reiterate points urged by Deering Milliken in its separate petition. However, since the points urged by Deering Milliken require reversal of the Board's order as to both respondents, Darlington relies upon and incorporates by reference the arguments made by Deering Milliken.

Statute Involved

The questions discussed in this petition involve application of section 8(a)(3) of the National Labor Relations Act, printed at App. 85a.[3]

Statement of the Case

For the past twelve years Darlington has been a respondent before the Board in this proceeding. The Board has twice upheld a claim by the Textile Workers Union that following its election as bargaining agent for Darlington employees Darlington violated section 8(a)(3) of the National Labor Relations Act by ceasing to conduct an unprofitable business and terminating its corporate existence.

Facts Giving Rise to the Controversy

Darlington was chartered by the laws of South Carolina in 1883. (R. 479.) It operated a single cotton mill in Darlington, South Carolina, which was built about 1888. It had no other plant or physical assets. (See R. 391.) As a result of Darlington's bankruptcy in 1937, about 41 per cent of its common stock passed to Deering Milliken, Inc., which had been a major creditor. (R. 391.)[4] By the 1950's Darlington was again in serious difficulties. The

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[3] Unless otherwise noted, record citations herein ("R.") are to the Joint Appendix printed in the Court of Appeals and included as part of the record in this case. "App." refers to the Appendix accompanying this petition.

[4] By 1956 a majority of Deering Milliken's stock was, in turn, owned by members of "the Milliken family," a group defined as "the lineal descendants of Seth Milliken." (App. 46a.) The same was true in 1956 of Cotwool Manufacturing Co., which then owned 18.3 per cent of Darlington's stock. Individual members of the Milliken family owned only 6.4 per cent of Darlington's stock directly. Deering Milliken owned 41.4 per cent. The remaining 33.9 per cent was owned by more than 200 non-Milliken shareholders scattered throughout the United States and abroad. R. 1310.

principal causes were declining textile prices, resulting from the introduction of more efficient equipment by United States manufacturers and the importation of low-cost foreign textile products, and shifting patterns of textile consumption in the United States away from the kinds of textiles Darlington's obsolescent equipment was designed to produce. (R. 53, 411-421, 444, 461-464.)

In 1952 Darlington began a program of capital improvement. (R. 444, 1283-85.) Darlington's ancient building made the introduction of new methods and equipment difficult and exceedingly costly. (See R. 58.) Competitive mills were able to proceed toward modernization more rapidly and cheaply. (R. 404, 407-09, 2758.) Between 1952 and 1956, Darlington's cost per unit produced remained unacceptably high, while its average return on invested capital (2.8 per cent) was less than half that for the industry as a whole. (See App. 47a; R. 392, 400, 404, 2164, 2183-85.)

In 1955 a study by Barnes Textile Associates, Inc., textile engineering consultants, confirmed that structural deficiencies in the plant building were the cause of Darlington's inability to bring costs into line with those of competitive mills. (R. 400-01.) The consultants' report recommended that an investment of approximately 1.2 million dollars be made in structurally improving and air conditioning Darlington's plant. (R. 399, 2166, 2171, 2759.)

Darlington's seven-member board of directors met in January of 1956 to consider these recommendations. The directors rejected them because, in their view, neither present nor anticipated future economic performance at Darlington justified an investment of that magnitude in unsalvageable structural modifications of the fundamentally unsound plant building. (R. 400, 416, 461.) Instead, the Darlington board determined upon a compromise under

which a smaller investment would be made in the renovation and purchase of equipment. The equipment could be removed if it proved unsuccessful to operate the mill competitively. Darlington's directors then believed that Darlington's economic prospects "did not justify making an investment that was permanent in nature, one that once made could not be taken out." (R. 399.) As Chief Judge Haynsworth recognized, "everything in this record points to the conclusion that Darlington's days were numbered." (App. 34a.)

In March 1956, two months after this meeting, the Textile Workers Union began an election campaign at Darlington. The campaign was based primarily on the union's promise that it would prevent Darlington from carrying out the changes in work assignments and procedures which had attended the installation of new equipment in accordance with decisions made by the Darlington board in January. (R. 422-23, 457, 469, 472, 1275-80.) The union won a narrow victory in an election held on September 6, 1956.

The Darlington board again met on September 12, 1956, to consider liquidation of the corporation. (R. 279-80.) This meeting was called by Roger Milliken, who was one of Darlington's seven directors. He owned about 4.7 per cent of its stock. (R. 388.) He held the title of President, and as such presided at the directors meetings; but Darlington's chief executive officer was its Treasurer, James Oeland. (See R. 120, 268-69, 561, 583, 1134.)

Roger Milliken testified that he believed the union's election warranted another review by Darlington's directors of "all of the economic factors affecting the company and the prospects of profitable operations in the future." (R. 475.) The union's victory was concededly a factor that, in Roger Milliken's view, was relevant to the question of liquidation. The Darlington board had concluded in Jan-

uary that labor costs had to be cut through the introduction of new equipment if there were to be any possibility of reducing costs to the point where the plant could continue in business. (R. 402-03, 422-24.) Yet the union had promised Darlington employees that it would oppose such changes. (R. 402-03, 422-24, 457, 469.)

In addition, the economic prognosis at Darlington had, by September, worsened in almost every respect. Textile prices had steadily declined from January levels. (R. 60, 418-21.) Costs had not improved, despite an investment of about $400,000 in the first nine months of that year in equipment improvements designed to cut labor costs. And a general wage increase was imminent. (R. 469-470, 1274.) At mid-year Darlington's Treasurer had estimated that the results for the fiscal year ending December 2 would show a loss of $40,000 (R. 61, 427, 443, 2757), and a loss of nearly a quarter of a million dollars was projected for fiscal 1957. (R. 441-42, 463, 476, 2695, 2757.) The Board recognized these facts. (App. 47a-48a.)

The loss projected for the then-current fiscal year was a substantial one, almost one-third of the preceding year's profit. The loss projected for fiscal 1957 was staggering—approximately double the greatest profit Darlington had made in any one of the previous five years, save one. (See R. 441-42.)

Darlington's seven directors, on September 12, 1956, unanimously recommended that the corporation be liquidated. (R. 2696.) A stockholders' meeting was duly called for October 17, 1956, and proxies were solicited authorizing the holder, without discretion, to vote the proxy as marked, for or against liquidation. (See R. 2699, 2761-62.) The recommendation to liquidate was carried by the vote of 134,911 shares for liquidation (97 per cent) to 3,774 shares against. (R. 1265.) Each of Darlington's seven directors,

and every stockholder called to testify, testified that in voting for liquidation he exercised his own independent judgment, based upon his assessment of Darlington's economic future; and each categorically denied that in casting his vote for liquidation he gave any consideration whatsoever to any possible effect that the liquidation of Darlington might have at any other mill.[5] This testimony, the Board concedes, "stands uncontradicted in the record" (App. 68a) as to every director and shareholder except Roger Milliken.

Prior Proceedings

The Board's first report and order, rendered October 13, 1962, recognized Darlington's serious economic problems over an extended period. Yet the Board's decision was that because the liquidation decision was, in the Board's view, prompted in part by the union's election, it violated section 8(a)(3)—whether or not "genuine economic factors" were also "responsible for the closing of the mill . . ."—and whether or not the advent of the union was itself genuinely regarded by Darlington, as Darlington had urged, as simply one of a number of objective factors impinging upon the company's prospects for profitable operations in the future. 139 NLRB at 245-246.

The Board thus took the position that an employer can never lawfully regard a union campaign and attendant promises as an "economic factor," even in a decision permanently and completely to liquidate an unprofitable business. Nowhere in its 1962 report and order did the Board suggest that the decision to liquidate Darlington was intended to have an effect on union activity elsewhere than at Darlington.

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[5] R. 2696-99, 2729-30, 2740-41, 2745-50, 2755-61, 2763, 2773, 2783, 3100-02, 3106, 3108, 3112, 3165-66, 3170-71, 3177-78, 3182, 3314-16, 3351-52, 3361, 3363-64, 3414-16, 3424, 3452-54, 3469, 3414-16, 3424.

The Board held that liability could be imposed on Deering Milliken as well as on Darlington on the theory that the various corporations with Milliken family majority ownership constituted a "single employer."

The Court of Appeals denied enforcement. Its decision, rendered November 15, 1963, stressed that the Darlington liquidation was "an actual, unfeigned and permanent end of operations . . ."; that "the mill was not transplanted elsewhere, and its sale was concededly entire, bona fide and irrevocable." 325 F. 2d at 685-686. The court reasoned that the statute does not "command an employer to stay in business . . ." (*id.* at 687) or "compel one to become or remain an employer" (*id.* at 685), and suggested that any other construction of the statute would render it "of doubtful validity." *Ibid.*

This Court's decision, rendered March 29, 1965, remanded the case for further proceedings. The Court agreed with the Court of Appeals that an employer may permanently close its entire business for any reason, but did not agree that a "partial closing," even though permanent, could *never* be unlawful. 380 U.S. at 274. Writing "in the context of the Board's finding that Darlington was part of a larger single enterprise controlled by the Milliken family . . .," this Court ruled:

> "If the persons exercising control over a plant that is being closed for antiunion reasons (1) have an interest in another business, whether or not affiliated with or engaged in the same line of commercial activity as the closed plant, of sufficient substantiality to give promise of their reaping a benefit from the discouragement of unionization in that business; (2) act to close their plant with the purpose of producing such a result; and (3) occupy a relationship to the other business which makes it realistically foreseeable that its em-

> ployees will fear that such business will also be closed down if they persist in organizational activities, we think that an unfair labor practice has been made out." 380 U.S. at 275-276.

The Court held that there was a "fatal defect" in the Board's decision in that its "findings as to the purpose and foreseeable effect of the Darlington closing pertained *only* to its impact on the Darlington employees." 380 U.S. at 276. (Emphasis by the Court.)

This Court stressed that a decision to permanently close down one's business, whether in whole or in part, "trenches . . . closely upon otherwise legitimate employer prerogatives. . . ." *Id.* at 276. For this reason the opinion specifically cautioned the Board: "[I]t does not suffice to establish the unfair labor practice charged here to argue that the Darlington closing necessarily had an adverse impact upon unionization in . . . other plants" owned by the single-employer entity hypothesized by the Board. *Ibid.* The opinion thus makes it clear that "legitimate employer prerogatives" were inextricably involved in the challenged act, and that liability was not lightly to be inferred by the Board in the absence of affirmative evidence establishing the factors of "purpose" and "effect" described in the opinion—"vital requisites," the Court emphasized, "of the general principles that govern a case of this kind." *Ibid.*

Proceedings on Remand

The case was remanded to the Board for a determination whether these "vital requisites" existed in this case.

Pursuant to this remand, hearings were held before examiner Buchanan, who had conducted all the previous hearings in the case. On August 10, 1966, the examiner issued a decision (R. 1920-2075) finding, after a careful and ex-

haustive analysis of the record, (1) that the persons exercising control over Darlington did not act to close that mill in order to discourage unionism at other plants in which the Millikin family owned interests, and (2) that the evidence adduced did not indicate that it was realistically foreseeable that employees at other plants would fear that their place of employment would be closed down if they persisted in organizational activities or that such employees were in fact led so to fear.

On June 27, 1967, the Board brushed aside the findings and recommendations of the examiner and again held that the decision to liquidate Darlington violated section 8(a)(3). The Board based its decision on a finding that Roger Milliken had the unlawful purpose required by this Court, but did not dispute the testimony of each other participant in the decision to liquidate that he exercised his own independent judgment and had not considered the impact of the closing on unionism elsewhere. (App. 68a-71a.) There was no finding, and no evidence, that any other director or shareholder of Darlington (1) shared Roger Milliken's prohibited motive, (2) knew of that motive, or (3) was dominated or controlled by Roger Milliken in reaching his decision.

The Court of Appeals, on May 31, 1968, upheld the Board on the assumption that the Board had based its decision on evidence and findings that Roger Milliken exercised control or domination over other Darlington directors.[6] In addition, the Court of Appeals offered as an alternative basis for upholding the Board a finding, not made by the Board, that Roger Milliken controlled the vote of a majority of the Darlington stock for liquidation. (App. 23a.) Judges Bryan and Boreman dissented on the

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[6] The jurisdiction of the Court of Appeals to review the Board's decision was conferred by 29 U.S.C. § 160(f).

ground that the Board had failed properly to apply the rule laid down in this Court's decision, particularly because the Board ignored the motives of all the directors and shareholders other than Roger Milliken. (App. 37a.) Chief Judge Haynsworth filed a separate concurring opinion expressing "misgivings" about the decision. (App. 33a.) On September 11, 1968, Chief Judge Haynsworth entered an order staying the court's mandate conditioned upon the filing of petitions for certiorari in this Court within sixty days.

Reasons for Granting the Writ

The Board's decision cannot be reconciled with the principles laid down, for the guidance of lower courts and the Board, by this Court in its prior opinion. This case, as the Court recognized, was the first to place in issue the lawfulness of a partial closing of a business allegedly motivated by a purpose to chill unionism elsewhere. Pointing out that this is an area which "trenches . . . closely upon otherwise legitimate employer prerogatives . . .," the Court carefully formulated a rule intended to serve as a line of demarcation between those prerogatives and the right of employees to bargain collectively.

The Board has misunderstood and misapplied the demarcation line fashioned by the Court, and has done so in a way that, if not corrected, will seriously disturb the proper balance between the important interests involved. This Court held that a plant closing is unlawful if and only if "the persons exercising control over" the closing act for the purpose of chilling unionism in other businesses in which they have an interest. The Board has held that the Court's test is satisfied if a single director-shareholder secretly harbors the proscribed purpose, even though his vote was not essential to the closing of the plant and even

though he did not dictate or control the vote of the other directors and shareholders, who are shown by uncontradicted evidence to have voted to liquidate for reasons unrelated to any purpose to chill unionism in other plants.

The findings on which the Board based its decision fall far short of those required to satisfy the standard that this Court laid down. The Board's misapplication of that standard, if allowed to stand as a precedent, will have wide consequences, for the United States textile industry, and for other industries similarly faced with new competitive pressures that make existing production procedures and facilities uneconomical.[7] The authority to liquidate one of a group of plants because its continued operation will result in substantial losses is a prerogative of corporate management that is frequently exercised. It is a prerogative of substantial importance in any economy that depends primarily upon private initiative for the efficient allocation of effort and resources. The Board decision would substantially impair this prerogative. The decision assumes that a majority of those controlling a corporate business may not lawfully exercise the prerogative, even though their motives are lawful, if there is evidence that a single member of management was prompted by an undisclosed and unlawful purpose. Any such rule of decision is inconsistent with the careful balance of competing interests that this Court attempted to achieve in its earlier decision.

The Court of Appeals sustained the Board's result on the basis of findings which the Board did not make and which the evidence would not have supported. In so doing

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[7] The record in this case shows that economic change has required widespread adjustment throughout the textile industry, with attendant liquidation of existing plant facilities at a rate which by 1956 exceeded one hundred plants a year. R. 416-17.

the Court of Appeals violated principles that are essential to the orderly process of judicial review of administrative action. Its decision is in direct conflict with the decision of this Court in *SEC* v. *Chenery Corp.*, 318 U.S. 80, and supplies a distinct and compelling reason for review by this Court.

Because the Court of Appeals and the Board have sought to hold Darlington's liquidation unlawful on different grounds, we shall consider first whether the Board's order can be sustained on its own terms, and second, whether the Court of Appeals erred in attempting to sustain the Board on the basis of assumed findings that the Board in fact did not make.

1. *The Board's Finding of Unlawful Intent on the Part of Roger Milliken Alone Does Not Satisfy the Requirement of This Court That the Chilling Purpose Must Have Been Shared by "the Persons Exercising Control Over" the Plant Closing.*

The decision to liquidate Darlington was made by its seven directors unanimously, and by its shareholders by a 97 per cent vote. Each of these decisions was made by vote at a meeting after full discussion of the factors weighing both for and against closing the plant. Directors and shareholders who had no interest in any other Deering Milliken mill, and who thus could not possibly have had the prohibited motive, participated and concurred in the decision to liquidate.

At the remand hearing all seven Darlington directors testified extensively, on direct and cross, as to their purposes and motives in recommending liquidation. (R. 2695-97, 2740-41, 2760-61, 3100-01, 3363-64, 3414-16, 3424, 3452.) As these directors were also stockholders, many of them also testified concerning those same matters in relation

to the stockholders' meeting where the directors' recommendation was adopted. (R. 2699, 2763, 3102, 3315-16, 3454.) In addition, other Darlington stockholders, including the largest individual stockholder (holding about 13 per cent, R. 1214), also testified. (R. 3101-02, 3163-66, 3170, 3178.)

The boards of directors of Deering Milliken, Inc., and of Cotwool Manufacturing Corporation, the two largest shareholders of Darlington, also met and determined to vote the Darlington stock held by their corporations in favor of liquidation. (R. 2699, 2742, 2761-62, 3362-63.) Four of the twelve participants in these two directors' meetings testified.

Each participant in these decisions testified emphatically that he did not vote to close the Darlington plant because of any effect the closing might have upon union activity elsewhere; each denied that the possibility that the Darlington closing would have an effect upon employee organizational activity at any other plant had been discussed or considered. Each testified that in voting as a director or stockholder he exercised his own independent judgment, based on the economic situation at Darlington. Several participants testified that they considered the impact of the union's election *at Darlington* upon the company's efforts *there* to bring costs into line with other mills.[8]

The Board does not question any of this testimony on the part of any of the participants except Roger Milliken.

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[8] R. 2695-99, 2729-30, 2737-42, 2745-50, 2755-61, 2763, 2773, 2783, 3100-02, 3106, 3112, 3165-66, 3170-71, 3177-78, 3182, 3314-16, 3351-52, 3361-64, 3414-16, 3424, 3452-54, 3469. Much of this testimony was given prior to the time this Court laid down its "chilling purpose" test in the present case and before anyone could have known that such a test was part of our law. R. 7-9, 55, 57-66, 291-92, 422-31.

The Board simply disregards it and announces that, in its view, "the critical purpose is the one which moved Roger Milliken." (App. 68a.)

In holding the decision to liquidate Darlington unlawful because of the alleged motive of Roger Milliken alone, the Board fails to satisfy the explicit test laid down by this Court. The crucial language of this Court's decision required the Board to find that "the persons exercising control over" Darlington acted "to close their plant" for the specific purpose of deterring unionism at other plants in which they had a substantial interest. Roger Milliken alone did not exercise control over the closing of Darlington and the Board does not find that he did. Nor does the Board find that the other Darlington directors and shareholders, who with Roger Milliken shared control over Darlington, were subject to Roger Milliken's dictation, direction or control. Indeed, the Board makes no finding that any other director or shareholder of Darlington even *knew* that Roger Milliken had the prohibited motive.

The Board's own language betrays its concession that Roger Milliken was by no means the sole "person exercising control over" the Darlington closing. The Board speaks of "Roger Milliken and the Milliken family" as "those in control of Darlington" (App. 51a), and elsewhere defines "the persons exercising control over" Darlington as "the Milliken family, as advised and influenced by Roger Milliken." (App. 52a.) More specifically, the Board recognizes that the votes of four Milliken family directors, of whom Roger was but one, were "the only votes necessary to carry the resolution" of liquidation. (App. 69a.) The Board's ultimate finding was that "those exercising control over Darlington, especially in the person of Roger Milliken," had the prohibited purpose. (App. 84a.) This ultimate

finding is not supported by specific findings of fact, and is expressly contradicted by the Board's concession that there is no evidence in the record to impeach the testimony of each other director-shareholder, including that of each other Milliken family director of Darlington, that he did not act with the intent to chill union activity in other plants.[9]

Since the Board recognizes that other persons besides Roger Milliken were in the group "exercising control over" the closing, and since everywhere but in its ultimate conclusory finding the Board concedes that there is no basis in the record to justify a finding that any other member of the group acted with the proscribed purpose (App. 68a), the Board was faced with a failure of proof that had to be bridged somehow if liability was to be imposed. The only logical way this gap could be bridged was by a finding that Roger Milliken dictated or controlled the decision of the other directors, so that his purpose alone was the operative or effective purpose. But this finding the Board did not and could not make; the record is as devoid of any hint of such dictation or control as it is of evidence that other directors or shareholders harbored the proscribed intent themselves. Indeed, the record flatly negatives any such dictation or control through a wealth of unchallenged evidence to the contrary, which, again, the Board does not challenge or reject. (R. 424-31, 2696, 2699, 2740-41, 2760-61, 2763, 2773, 3102, 3166, 3314-15, 3452.)

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[9] Probably the most revealing and critical language in the Board's opinion is this (App. 68a): "We are aware of the testimony by the members of the board of directors and stockholders (including Roger Milliken) that they did not intend, by the votes they cast, to chill unionism elsewhere, and that such a prospect was not discussed at the two meetings. While the Trial Examiner did not expressly find this testimony credible, neither did he discredit it, and it stands uncontradicted in the record. But we find it of little moment that there was such testimony from the other directors for we believe that the critical purpose is the one which moved Roger Milliken."

The Board attempted to bridge the gap in the evidence by finding that Roger Milliken "advised and influenced" the other directors and then concluding that this in some way was enough to make his purpose determinative and theirs irrelevant, *even though* they concededly voted independently and for their own reasons, and *even though* if Roger Milliken held a chilling purpose he carefully concealed it from the others. The Board's reasoning is inconsistent with the standard laid down by this Court in its prior opinion. That standard was stated in terms of *control* not *advice* or *influence*. *Cf. Denver & R. G. W. R.R.* v. *United States*, 387 U.S. 485, 501. If a person was one of those who controlled the Darlington closing—and by the Board's own admission at least the four Milliken family directors were in this group—then his purpose is relevant unless he himself was controlled by another.

The Board's findings do not face the issues squarely. The findings contain a number of statements with respect to the position of Roger Milliken but there is no direct unequivocal finding that Roger Milliken dominated or controlled the other directors or that he communicated his alleged unlawful intent to them. Instead the Board speaks of Roger Milliken as "the chief figure in the family hierarchy" (App. 46a); the "appointed steward of the Milliken family interests." (App. 47a.) "He held the obvious position of power in the corporate organization, he convened the meeting, he offered the resolution, and he advised why the resolution should be accepted." (App. 68a.) From this the Board concludes that "Roger Milliken's denial of illicit purpose is the one which must survive the weight of the other evidence. . . ." (App. 70a-71a.)

The conclusion is a complete *non sequitur* and distorts the standard this Court formulated. Roger Milliken could, as he did, make recommendations to the other Darlington

directors; but whether they accepted them or not was a matter for their own decision in the exercise of their fiduciary duty to all the shareholders, Milliken and non-Milliken. The Board does not challenge the testimony of each participant in the crucial decision to liquidate Darlington that he exercised his own independent judgment in voting for liquidation. Thus, Roger Milliken may or may not have been the family's "chief figure" or "steward" in other, more routine undertakings, in the day-to-day management of many of the family investments; but in liquidating Darlington each Milliken director participated deliberately and independently; each acted for his "own reasons," about which every director testified at length (*e.g.*, R. 2747-50); and each emphatically denied that he was "taking orders from anybody." (*E.g.*, R. 2699.) There is no evidence and no finding to the contrary.

The Board makes no findings that the other directors and shareholders habitually *followed* advice they received from Roger Milliken, or that they had no other sources of advice and influence, including one another. Indeed, at the Darlington directors' meeting which voted for liquidation several other directors, including non-Milliken directors, also "advised" why they thought the plant should be closed. (R. 2694-95, 2739, 2757-59, 3100.) And the Board does not find that their advice was without influence.

Whatever the Board means by "advised and influenced," it cannot mean either that the vote of any other Milliken director was dictated or controlled by Roger Milliken or that any other Milliken director or shareholder believed that the purpose of liquidation was to deter unionism at any other plant. The "advice" that Roger Milliken gave was that it seemed hopeless to expect that Darlington could become profitable and it should therefore be liquidated. (R. 2692, 2738, 2773-74, 3106, 3108, 3314, 3462-63.) If he

had a chilling purpose, he kept it completely to himself. There is no finding that he "advised and influenced" any other participant in the liquidation decision, director or shareholder, Milliken or non-Milliken, to close the plant as a deterrent to unionism at other mills. Hence the Board's decision cannot be sustained on a theory that Roger Milliken's fellow directors somehow accepted or ratified his chilling purpose by acting with him, knowing that he was acting for that purpose.

The Board seeks support for its result in the fact that Roger Milliken "voted a majority of the stock in Darlington in favor of liquidating the plant." (App. 23a.) It is true that Roger Milliken voted shares other than his own, as one of two persons named as proxies by Darlington's shareholders. But as proxy Roger Milliken had no discretion whatever; the fact that he rather than some other person was named as proxy is without legal or practical significance. The controlling purposes were those of the persons who authorized that their shares be voted for liquidation. In the case of the shares owned by Deering Milliken, Inc. and Cotwool Manufacturing Company, which together comprised over 50 per cent of the stock of Darlington, the record shows that the directors of these corporations instructed the proxy-holders to vote the Darlington stock in favor of liquidation. (R. 2699, 2761-62.)

2. *The Court of Appeals' Decision Assumes Findings Which the Board Did Not and Could Not Make.*

The Board's order must stand or fall on its own terms. The Court of Appeals, in attempting to sustain the Board's result on the basis of findings which the Board did not and could not make, has committed a clear violation of the principles laid down by this Court in *SEC* v. *Chenery Corp.*, 318 U.S. 80, and consistently reaffirmed in subse-

quent decisions. *E.g., NLRB* v. *Metropolitan Life Ins. Co.*, 380 U.S. 438, 443-444; *Texas Gas Transmission Corp.* v. *Shell Oil Co.*, 363 U.S. 263, 270. These principles are at the very heart of the orderly process of judicial review of administrative action. The Court of Appeals' violation of them in this case is itself a compelling reason for review by this Court.

The Court of Appeals deals with the problems raised by the Board's exclusive reliance upon the alleged motive of Roger Milliken in a single paragraph of its opinion. (App. 23a.) In that paragraph the court notes the Board's finding that "Milliken interests controlled Darlington," and seems either to assume or to supply two additional findings which the Board did not make. These are: (1) a finding that Roger Milliken, who according to the court "occupied a dominant role in the management and control of these interests," controlled other Darlington directors in the decision to liquidate the mill; and (2) a finding that the controlling "Milliken interests" in any event "ultimately liquidated the corporation" by voting "a majority of the stock for liquidation," the court implying here that the Board had based its decision upon an alternative theory that Roger Milliken controlled the Darlington stock, even if he did not control the Darlington board, or that a majority of the stockholders who voted for liquidation shared his allegedly unlawful purpose.

The suggested finding that Roger Milliken somehow dominated or controlled the other directors in their decision to vote to liquidate Darlington is one which, as we have seen, the Board was simply unwilling to make on the record before it. No such finding could be supported by the record, as the Board was plainly well aware.

The court observed that "the Board did not have to shut its eyes to the fact that corporate directors are

frequently responsive to interests that control the majority of a corporation's stock." But the Board did not and could not find that any director was "responsive" to Roger Milliken in the sense that his exercise of his own independent judgment was dictated or controlled. Moreover, this comment of the court ignores the fact—never controverted by the Board—that the other members of the Milliken family who sat on Darlington's board represented the majority "interests" just as much as Roger Milliken did.

In offering as an alternative ground for decision the fact that "it was the stockholders who ultimately liquidated the corporation," the court departs even more sharply from the findings and theory advanced by the Board. General Counsel never attempted at the remand hearings to establish the "purpose" element of this Court's test by treating as the decisive act of liquidation the stockholders' ratification of the directors' decision to initiate liquidation. The Board made no specific finding that any stockholder shared Roger Milliken's allegedly unlawful purpose and never suggested as an alternative ground for decision that the persons who controlled the Darlington stock, and authorized it to be voted for liquidation, did so with the purpose required by this Court's decision. In fact the only evidence of record bearing on the stockholders' purpose in voting for liquidation shows that the stockholders exercised an independent judgment and that a majority of the stock was voted for liquidation for reasons which the Board does not and cannot question.[10]

In *Chenery* it was made clear that, even where the re-

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[10] R. 2699, 2763, 3102, 3165-66, 3178, 3454. General Counsel sought to exclude stockholder testimony with the concession: "We don't profess that a single stockholder who went along with a recommendation of dissolution had a motive to discourage organization throughout the Milliken mills in the entire area." R. 3178.

viewing court attempts to ground its decision upon "findings" or "considerations" which "might have been made" or "disclosed" by the agency, it cannot do so, if these were not the grounds upon which the agency itself based its action. 318 U.S. at 87-88, 90. In this case the Court of Appeals' violation of *Chenery* principles is far more serious, since the court has based its decision upon supplied or assumed findings which the Board not only did not make but clearly recognized it could not make.

Conclusion

For the foregoing reasons this petition for a writ of certiorari should be granted.

Respectfully submitted,

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November 8, 1968

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IN THE

Supreme Court of the United States

OCTOBER TERM 1968

DEERING MILLIKEN, INC. and DEERING MILLIKEN & CO., INC.,

Petitioners,

v.

NATIONAL LABOR RELATIONS BOARD and TEXTILE WORKERS UNION OF AMERICA, AFL-CIO

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

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No. .....

IN THE

Supreme Court of the United States

OCTOBER TERM 1968

DEERING MILLIKEN, INC. and DEERING MILLIKEN & CO., INC.,

Petitioners,

v.

NATIONAL LABOR RELATIONS BOARD and TEXTILE WORKERS UNION OF AMERICA, AFL-CIO

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

Deering Milliken, Inc.[1] petitions for a writ of certiorari to review the *en banc* decision of the Court of Appeals for the Fourth Circuit entered in this case on May 31, 1968.

OPINIONS BELOW

The opinions of the Court of Appeals (Appendix, pp. 5a-40a[2]) are reported at 397 F. 2d 760. The findings of fact, conclusions of law and order of the Board consist of (a) the Board's 1962 decision and order, reported at 139

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[1]Deering Milliken & Co., Inc., disappeared in 1960 as a result of the merger which created Deering Milliken, Inc., but the Board's order continues to run against the old company, and it is therefore named as a petitioner.

[2]The Appendix to this petition is filed as a separate volume as it relates both to this petition and the companion petition of Darlington Manufacturing Company. Record citations followed by *a* are to the pages of this Appendix.

NLRB 241 (J.A. 1-246[3]), and (b) the Board's supplemental decision, 165 NLRB No. 100 (41a-84a).

JURISDICTION

The decision of the Court of Appeals was rendered May 31, 1968, and a decree of enforcement was entered the same day (1a). On August 29, 1968, the Court of Appeals denied a petition for rehearing (3a). The jurisdiction of this Court is invoked under 28 U. S. C. § 1254(1) and §§ 10(e) and (f) of the National Labor Relations Act, as amended.

QUESTIONS PRESENTED

1. Whether the Board may find a violation of § 8(a)(3) of the National Labor Relations Act, as in the case of a partial closing of a business, where it concludes only that the employer was partly or incidentally motivated by a purpose to discourage future organizational activities in its other plants[4].

2. Whether the requirement laid down by this Court that the closing must also produce a "chilling effect" on other employees is sufficiently met by the Board's finding that the closing had a "reasonable tendency to discourage" future union activities in the other plants.

3. Whether the Board is prevented by the First Amendment and § 8(c) of the Act from using (a) an internal management memorandum, circulated weeks after the clos-

[3] "J.A." refers to the joint appendix before the Court of Appeals on the last appeal.

[4] Darlington's petition for certiorari deals with the question whether the action of the "employer" was sufficiently established by a finding expressly confined to Roger Milliken alone. Petitioner Deering Milliken adopts the Darlington petition in all respects.

ing, to prove the illegal purpose of the closing, and (b) two speeches by the company's president, months before the union campaign had begun, to "clarify and shed light upon" other events.

STATUTE INVOLVED

The relevant provisions of the National Labor Relations Act, as amended, 61 Stat. 136, 29 U. S. C. §§ 151 *et seq.*, are set forth in the Appendix, p. 85a.

STATEMENT

The essential background facts are set out in Mr. Justice Harlan's opinion for a unanimous Court (Justices Stewart and Goldberg not participating) on the prior appeal. *Textile Workers Union* v. *Darlington Mfg. Co.*, 380 U. S. 263, 265-66 (1965). Darlington had for approximately seventy years operated a small cotton textile plant in South Carolina. When the union won a representation election at that plant by a narrow margin in September 1956, Darlington's directors and stockholders voted to dissolve the company and sell its assets, resulting in the charge which is again brought before this Court by the present petition.

The Court's decision was a final disposition of the case if Darlington were regarded as a single unaffiliated company, but not if, as the Board and union claimed, Darlington were but one of a group or complex of corporations, controlled by the Milliken family through the agency of Deering Milliken, Inc. and other corporations. As to the first proposition, the Court said it would be a "startling innovation" (380 U. S. at 270) to hold that a single businessman violates the Act by going out of business, even if motivated by union animus or vindictiveness (pp. 272, 274). But the Court held that if Darlington were in reality a part

of a multi-plant employer, its closing must be regarded as a partial closing of a business, as to which different rules would apply. In that event, the Court said, an unfair labor practice was committed under § 8(a)(3) if the shutdown was "motivated by a purpose to chill unionism in any of the remaining plants of the single employer and if the employer may reasonably have foreseen that such closing would likely have that effect" (p. 275).

Because this case involves "issues of first impression" (p. 277), trenching "closely upon otherwise legitimate employer prerogatives" (p. 276), this Court remanded the case for further Board findings with respect to the "vital requisites" of (a) the chilling purpose of the Darlington closing and (b) its effect upon employees at other plants who might "fear that such [plants] will also be closed down if they persist in organizational activities" (p. 276).

A. The Board's Supplemental Decision

After further exhaustive hearings, the Board's trial examiner held in a lengthy decision (J.A. 1920-2075) that the complaint should be dismissed because neither chilling purpose nor chilling effect had been proved.

Reversing, the Board held that the examiner had misinterpreted the three-part test laid down by this Court (380 U. S. at 275-76), and that in fact and law each requisite to liability had been made out:

Single Employer. The Board reaffirmed its earlier finding that all the companies selling their textile products through Deering Milliken in 1956 constituted a single employer, so as to satisfy the requirement that persons controlling the closed plant have a sufficient "interest" in and "relationship" (p. 276) to other plants to promise a benefit from the discouragement of unionization there (51a-53a).

Chilling Purpose. The Board held, largely because of two speeches by Roger Milliken and an internal memorandum from him to the mills' managements, that this requirement was satisfied by evidence and inferences that he was responsible for the closing, and that "among his purposes" was that of discouraging unionism in other plants (75a-76a). It rejected claims by the companies that it was insufficient to determine his motive alone (68a, 75a), or that the purpose to chill must be found the primary, or at least a substantial, motive for the shutdown (73a).

Chilling Effect. The Board held that it was not necessary to determine whether any chill was felt by employees at other plants, or whether any organizational activities at those mills were in fact discouraged by the Darlington closing. Instead, it was said that this Court only intended it to inquire whether the closing had a natural "tendency to discourage" union adherence elsewhere (82a), and it found that a number of other employees were "in all likelihood" so affected (84a).

The Board left untouched its 1962 order (J.A. 30-33), which *inter alia* required both Darlington and Deering Milliken to make former Darlington employees whole for pay lost in the period from the 1956 closing to the gaining of substantially equivalent employment, and directed Deering Milliken to establish preferential hiring lists at the other mills.

B. The Decision of the Court of Appeals

A divided court, sitting *en banc,* granted enforcement of the Board's order.

The majority, after finding the Board's single-employer findings adequately supported,[5] agreed with the Board's

[5]On the prior appeal, this Court had directed review of the Board's finding that Deering Milliken and the mill corporations, including

conclusion that a purpose to chill unionism in other plants existed. The Court accepted the Board's view that it need only be shown that the employer was motivated "at least in part" by such purpose in shutting the plant (25a), and that motivation could be proved by employer statements showing an antiunion bias (19a-21a).

The Court also held that the requisite chilling effect need not be shown to have actually been felt by other employees, and that it was not necessary to proof of a violation that a union be actively organizing the other plants so long as the employer anticipated that such activity might someday commence.

The Chief Judge concurred, "not without some misgivings" (33a).

The two dissenting judges would have refused enforcement of the Board's order, principally on the ground that the Board had based its findings of chilling purpose and effect largely upon evidence already in the record on the last appeal, and which this Court, by remanding the case for further evidence, must have found insufficient to warrant such findings (37a). The minority also thought that neither the Board nor the majority was entitled to disregard the uncontradicted testimony of the Darlington directors that they gave no thought to the effect of the closing on other mills (38a-40a).

REASONS FOR GRANTING THE WRIT

The right to close an entire business permanently for any reason without violating § 8(a)(3) is now settled as a result of this Court's 1965 decision. But the legality of

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Darlington, constituted a "single employer", judged in accordance with this Court's restatement of the applicable principles (380 U. S. at 277). The Court of Appeals held that the finding was supported by the evidence considered as a whole (14a). No question as to the correctness of this holding is raised by this petition.

any closing that does not extinguish the entire business—a matter this Court obviously thought it had also settled—remains shrouded in uncertainty as a result of the Board's subsequent action.

The permanent discontinuance of part of a business concededly raises "an important [question] in the administration of the Labor Act"[6]. This is also recognized in the widespread comment evoked by the Court's statement of precepts applicable to partial closings[7]. But despite this Court's clear delineation of the kind of proof necessary, a partial closing has here been adjudged to violate § 8(a)(3) on the basis of (1) a purpose to chill not found to be the true motive of the employer, (2) not shown to have had any impact on other employees' union activities, (3) proved against the employer by the use of materials entitled to the protection of the First Amendment and § 8(c) of the Act.

1. This Court was precise in defining what would, and what would not, be acceptable evidence of chilling purpose. It is not enough that a plant "is being closed for antiunion reasons" (p. 275), for a closing, even on the heels of a union election victory, is an "ambiguous" act, not "inherently discriminatory" (p. 269, n. 10). Nor does it suffice to establish only that the closing "necessarily had an adverse impact upon unionization in such other plants"

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[6]Quoted from p. 16 of the Solicitor General's Petition for Certiorari on the prior appeal, October Term 1963, No. 874, where it was also said that the issue involved "a difficult accommodation between" basic management and employee rights (p. 17).

[7]Eighteen articles commenting on the decision are listed at 14 INDEX LEG. PER. 884 (1967). Two of the many leading articles discussing the case are specially relevant to the points here made. In Christensen & Svanoe, *Motive and Intent in the Commission of Unfair Labor Practices*, 77 YALE L. J. 1269 (1968), the authors remark that the decision "ruled that motive cannot be inferred from effect nor effect from motive; both require objective proof" (p. 1310; see also p. 1327). The same point is made in Getman, *Section 8(a)(3) of the N.L.R.A. and the Effort to Insulate Free Employee Choice*, 32 U. CHI. L. REV. 735, 756 (1965).

(p. 276). The remand ordered by this Court was to allow a search for "motivation which is aimed at achieving the prohibited effect" (p. 276).

The Court was similarly clear in describing the kind of motivation it had in mind. Citing directly to *Darlington,* the Court said in another case decided the same day, *N. L. R. B.* v. *Brown,* 380 U. S. 278, 287, that "the 'real motive' of the employer in an alleged § 8(a)(3) violation is decisive". Similarly, the Court referred to the concurring opinion in the hiring hall case, where it had observed that permissible employer actions are not limited to those having "*no* foreseeable tendency to encourage or discourage union membership or concerted activities"[8].

The Board ignored these warnings, rejecting the contention that its search was for the "true" or "dominant" purpose behind the closing of Darlington (73a).[9] The examiner had read this Court as requiring that the chilling purpose be "a substantial or a triggering purpose without which the action would not have been taken, but not necessarily the dominant purpose" (J.A. 1956). The Court of Appeals seems to have accepted that the illegal purpose must be "the moving cause, a substantial cause, or the immediate cause" of the employer's conduct (24a, n. 26), but it failed to perceive that the Board had expressly refused to find that the purpose to chill was any of these.

In using partial or incidental employer motivation to make an otherwise legal action illegal, the Board and the

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[8] *Local 357, Teamsters* v. *N. L. R. B.,* 365 U. S. 667, 680 (1961), cited at p. 276 of *Darlington.*

[9] It placed its rejection on two grounds: (1) Because this Court used the language, "if motivated by *a* purpose" (p. 275), and "a plant that is being closed for antiunion reasons" (*ibid.*) [but the Board neglected to quote, "act to close their plant with *the* purpose of producing such a result" (p. 275) or "*the* purpose of obtaining some [future] benefit (p. 273)]; (2) Because the Board found warrant for its "at least in part" approach in this Court's incidental use of the phrase at p. 273, n. 19.

Court have added a new dimension to an already confusing picture. Some courts have required in § 8(a)(3) cases, especially those involving partial closings, that the Board find the illegal motive to be the dominant one[10]. Others have accepted as sufficient a Board finding that the motive contributed *substantially* to the result, in the sense that but for the illicit purpose the action would not have been taken[11]. This is the first occasion it has been found sufficient for the Board to find a violation in a partial closing because unlawful motivation contributed only "at least in part" to the result.

As proof of such motivation is one of the "vital requisites" (p. 276) to liability under § 8(a)(3), the inquiry must probe more deeply than the loose test the Board has set for itself, as shown by the two other leading cases decided the same day as *Darlington*. The employer actions upheld in *N.L.R.B.* v. *Brown*, 380 U. S. 278, and *American Ship Building Co.* v. *N.L.R.B.*, *id.* 300, were motivated "at least in part" by a desire to discourage unionism; in both cases the employer was absolved on the basis of his "true" or "dominant" motivation. But the Board was faced with

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[10] *E. g.*, *N. L. R. B.* v. *Neiderman*, 334 F. 2d 601, 604 (2d Cir. 1964); *N. L. R. B.* v. *Jones Sausage Co.*, 257 F. 2d 878, 881-82 (4th Cir. 1958); *N. L. R. B.* v. *Kingsford*, 313 F. 2d 826, 831 (6th Cir. 1963) [but see *N. L. R. P.* v. *Ogle Protection Serv., Inc.*, 375 F. 497, 505 (6th Cir.), *cert. denied*, 389 U. S. 843 (1967)]; *Nachman Corp.* v. *N. L. R. B.*, 337 F. 2d 421 423 (7th Cir. 1964); *Marshfield Steel Co.* v. *N. L. R. B.*, 324 F. 2d 333, 337 (8th Cir. 1963).

[11] *N. L. R. B.* v. *Billen Shoe Co.*, 397 F. 2d 801, 803 (1st Cir. 1968); *N. L. R. B.* v. *Houston Chronicle Pub. Co.*, 211 F. 2d 848, 850-51 (5th Cir. 1954); *N. L. R. B.* v. *Atlanta Coca-Cola Bottling Co.*, 293 F. 2d 300, 309 (5th Cir. 1961); Accord: *Rust Sales Co.*, 157 NLRB 1681, 1688 (1966) ("dominant motive"); *Tonkin Corp. of California*, 165 NLRB No. 61, 65 LRRM 1521, 1523 (1967) ("in substantial part" antiunion); *Mid-West Towel & Linen Service, Inc.*, 143 NLRB 744, 754 (1963), *enf'd*, 339 F. 2d 958, 962 (7th Cir. 1964) ("the predominating or motivating reasons").

conceptual difficulties if it used either of these tests here[12], and it simply ignored the inconsistency.

It is not mere semantics to require that the illegal purpose be a significant element in the totality of motivations leading to the challenged action. If *any* illegal motivation will taint the resulting action, then this Court's decision, which was intended to settle the rules applicable to partial closings, may well result in challenge to a whole new group of employer actions under § 8(a)(3).[13]

2. The second requirement, that there must also have been a chilling effect on employees in other Deering Milliken plants, was likewise precisely defined (p. 276):

> "It does not suffice to establish the unfair labor practice charged here to argue that the Darlington closing necessarily had an adverse impact upon unionization in such other plants."

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[12]The Board had held in 1962 that Darlington was closed to punish the employees for exercising their rights to self-organization. In 1965 this Court held this was a lawful purpose. This posed a dilemma for the Board on remand: how could it now find the true purpose was to chill? Contrary to the Court of Appeals (24a), we did not claim a basic incompatibility between these two motives, but only that the earlier finding explained why the Board later felt it necessary to adopt its strained "at least in part" formulation.

[13]We do not suggest that either the Board or the Court would demand absolute purity of motive before exculpating the employer, or that liability can be found under this Court's decision only by showing that the chilling purpose was so dominant as to be a virtual obsession. Between these polar positions, however, lies what common sense tells us will be the great majority of actual cases. It will be the rare employer who can prove that he gave no contemplation whatever to whether the closing of part of his business would deter union organization of the rest. As the Chief Judge observed (33a), it would be "managerial imprudence" for this factor to be ignored.

Nor, said the Court (p. 269), is this a situation where the employer "must be held to intend the very consequences which foreseeably and inescapably flow from his actions"[14].

Despite these clear statements, the Board dealt with this issue as follows (82a):

> "[W]e assume that the Court intends us to apply the usual standard of whether the closing had a natural 'tendency to discourage' union adherence in other plants [citing *Radio Officers*]."

But when this Court had spoken of reasonably foreseeable effect (p. 275), it did so in terms of employer motivation, and the context showed that it intended the Board to go beyond finding a mere expectation that the Darlington example might someday discourage employee attempts at self-organization in other mills.[15]

Despite tremendous effort on the part of the Board's General Counsel to prove an *in terrorem* effect from the Darlington closing at the other mills, the Board conceded that very little evidence of this kind was adduced (81a). But this gap in the record did not authorize it to resort to a *Radio Officers* test, if only because the absence of any evidence of actual effect tends to rebut any inference sought to be drawn as to the effect that was foreseeable. *Cf. Modern*

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[14]Citing *N. L. R. B.* v. *Erie Resistor Corp.*, 373 U. S. 221, 228 (1962), followed by "See *Radio Officers* v. *Labor Board*, 347 U. S. 17, 42-43".

[15]Thus, the Court spoke of the foreseeability that other employees might fear that their plants would also be closed down "if they persist in organizational activities". Neither the Board nor the Court below would read into this phrase any more than the broad meaning of "engage in protected activities", as in § 7 of the Act, the Court rejecting anything else as "a fine distinction" (26a). But it seems clear that this Court chose its language with some care, recognizing that the more usual term could be misinterpreted. *Any* partial closing of an unorganized business will inevitably generate some employee apprehension about the consequences of "engaging" in union activities.

Plastics Corp. v. *N. L. R. B.*, 379 F. 2d 201, 204 (6th Cir. 1967); *United States* v. *American Optical Co.*, 39 F. R. D. 580, 585 (N. D. Calif. 1966).

Nor do the § 8(a)(1) cases cited by the Board (82a) and the Court of Appeals (29a, n. 33) relieve the Board from following this Court's precept. Such cases are irrelevant in considering a § 8(a)(3) charge, under which "due protection is to be accorded the employer's right to manage his enterprise [citing *Darlington*] * * * even though the act committed may tend to discourage union membership." *American Ship Building Co.* v. *N. L. R. B.*, 380 U. S. 300, 311 (1965).

In announcing a virtual *per se* rule affirming that any plant closing will discourage union adherence of employees at other plants the Board has misconstrued the precepts announced by this Court when this case was last before it. The error is of such fundamental gravity that it can only be corrected by further action of this Court.

3. Section 8(c) (quoted in full at 85a) provides that "The expressing of any views, argument, or opinion" shall neither be, nor be evidence of, an unfair labor practice "if such expression contains no threat of reprisal or force or promise of benefit". It is conceded that the employer statements used to fix liability here do not fall within the quoted exception (J.A. 1981-82, 2018, 2022). All were used on the basis of two other exceptions read into the statute: (1) employer statements which are "instructions" or "directions" are not protected by § 8(c), and (2) the section does not bar the use of employer statements as "proof" or, alternatively, as "background evidence" that other acts are violative. The validity of these two exceptions has not been directly passed upon by this Court, and we submit should be.

A. The exclusion as to "instructions or directions" was used by the Board and the Court to permit the receipt in

evidence of a single document, used to carry almost the entire weight of the Board's findings as to chilling purpose and effect. Two months after the decision of the directors to close Darlington, Roger Milliken circulated to the managers of the other mills a memorandum (and attachments) relating to the Darlington closing. These have been repeatedly cited by the Board[16] and have now become the *exclusive* evidentiary basis for a necessary ingredient of the Board's case, employer anticipation of union activity.

Both the Board and the Court of Appeals agreed that § 8(c) did not prohibit the use of the memorandum, but for different reasons. The Board, describing it as "a recommendation [to the mills] for a 'public relations' program" (66a), held that § 8(c) permitted the use of "employer statements of opposition to unions" where the employer's motivation was in issue (59a, n. 8). The Court viewed it in a different light: "The memorandum was a directive to the mill treasurers and other officials to review their public relations" (19a). It thus found it unprotected by § 8(c) because of Senator Taft's remarks that the section was not intended to "cover instructions, directions, or other statements which might be deemed admissions under ordinary rules of evidence" (19a).

The legislative history of the Act emphasizes the constitutional privilege of free speech inherent in § 8(c).[17] Even the Board, in the years immediately following enactment of the section, accepted the limitation placed upon its powers.[18]

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[16]The Board quoted extensively from the memorandum and its attachments in both its 1962 and 1967 decisions, and in his petition for certiorari on the last appeal (*supra* n. 6) the Solicitor General argued (p. 14) that it "accurately reflected * * * [the] avowed purpose" of the Darlington closing.

[17]Section 8(c) was passed because Congress believed the Board had unduly restricted an employer's right to speak freely on labor matters. Cox, *The Labor Management Relations Act*, 61 HARV. L.

The commentators were in agreement[19], and other Courts of Appeals have continued to regard it as "well settled" that a "narrow or strained construction" of the free speech provision is to be avoided. *E.g., N.L.R.B.* v. *Arkansas Grain Corp.,* 392 F. 2d 161, 163-64 (8th Cir. 1968).

The alternative exclusion, which would remove "instructions or directions" from the scope of § 8(c), is valid in theory, but cannot be applied here without distorting the purpose of the statute. Even the Board would not regard the memorandum as a directive (supra, p. 13). To deny the right to communicate freely with other executives without fear that the words will later be used by the Board as admissions, because they are "directive" in nature, introduces

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REV. 1, 15 (1947); see also Pokempner, *Employer Free Speech under the N.L.R.A.*, 25 MD. L. REV. 111, 112-15 (1965). The Senate bill had provided (1 LEGIS. HIST. OF L.M.R.A. 114) that a finding of unfair labor practice could not be "based" upon a protected statement, but the House version (*id.* 56), later adopted, prevented the Board from using a non-coercive statement even as "evidence" of a violation, because, as Senator Taft later explained, otherwise the employer "cannot afford to speak at all * * * there is [no] freedom of speech" 2 *id.* 1546.

That the Board may not consider non-coercive employer expressions as evidence because it decides that the employer's motivation or intention is at issue, see *id.* at 1555, 1567, 1580, 1591, and the President's veto message (1 *id.* 918).

[18]The Board held it could not rely upon non-coercive speeches "in evaluating the employer's motivation and conduct", *Carpenter Steel Co.,* 76 NLRB 670, 671 (1948), because § 8(c) provided that a finding that other employer actions were unfair labor practices could "in no degree" be based upon protected statements. *Pacific Moulded Prods.,* 76 NLRB 1140, n. 2 (1948); see also *Consumers Cooperative Refinery Ass'n,* 77 NLRB 528, 530 (1948), *aff'd per curiam,* 180 F. 2d 581 (5th Cir. 1950).

[19]Cox, *op. cit.* n. 17, p. 19; Wyle, *Union Organization Activity under Taft-Hartley,* 11th N.Y.U. CONF. ON LAB. 191, 202 (1958); Wyle & Englander, *"Free Speech" or Lawful Coercion,* 5 LAB. L.J. 270, 272-73 (1954). Mr. Wyle has been counsel of record for the union in this case.

mischievous possibilities into the law[20]. Senator Taft's explanation (quoted by the Court at 20a) that the intended reference was only to "statements which are acts in themselves or contain directions or instructions" emphasizes the incongruity of applying this rule to a management memo, not aimed at (or ever seen by) an employee audience.

Commentators have recognized that Senator Taft's explanation shows only an intent to preserve a narrow exception covering what the common law termed "verbal acts"[21]. Even the Board originally limited the exclusion to situations where the employer's words and conduct were "so intertwined as to be considered a single coercive act". N.L.R.B. ANN. REPT. (1948) 49. Such were the facts in the one instance where this Court found the statement on a picket's sign unprotected because directive in nature. *N.L.R.B.* v. *Denver Bldg. & Constr. Trades Council,* 341 U. S. 675, 690-91 (1951); But see *N.L.R.B.* v. *Exchange Parts Co.,* 375 U. S. 405, 409n (1964); *N. L. R. B.* v. *Golub Corp.,* 338 F. 2d 921, 927 (2d Cir. 1967).

B. Two speeches by Roger Milliken, long before the union appeared at Darlington, one to a group of state officials and the other to a local businessmen's club, were used by the Board as "direct communications of Roger Milliken's intention to thwart unionism wherever it appeared" (63a), although the Board ostensibly cited them only as evi-

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[20]For example, it may now be argued that the Board or a union is free to subpoena employer files dealing with the history or background of a labor dispute, or require the participants in management caucuses to report what was said, because there may be evidence of an instruction or direction which will render § 8(c) inapplicable.

[21]Drotning, *Employer Free Speech: Two Basic Questions Considered by the NLRB and the Courts,* 16 LAB. L. J. 131, 136-37 (1965), and Burke, *Employer Free Speech,* 26 FORD. L. REV. 266, 276, 291 (1957).

dence of his fears and beliefs (59a). The Court apparently with some misgivings[22], approved such use to show "background" and to "place other non-verbal acts in proper perspective" (21a), thereby disagreeing with several other Courts of Appeals, which have held the statute means what it says[23]. This becomes merely a device to evade the prohibition of § 8(c) against the use of statements as "evidence". It is anomalous to receive evidence barred as direct proof of guilt to prove a predisposition to commit the offense charged.

The time has come to call a halt to the gradual erosion of § 8(c), and the even more basic constitutional rights involved, by fine-spun distinctions of "background" information and "recommendations" that are transmuted into illegal directions. There is a clear need for this Court to give the same delineation of § 8(c) rights that it gave to other basic employer rights on the first appeal.

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[22]The Court conceded that the speeches stood "on a different footing" from the memorandum (20a), but added that, even if they were considered to be barred by § 8(c), they "revealed nothing of substance not shown by other evidence" (21a). But the Court did not specify what other evidence it had in mind, and it remains clear that there was no evidence whatever, other than materials covered by § 8(c), of the employer's anticipation of a union organizational drive.

[23]*Coppus Eng'r Corp.* v. *N.L.R.B.*, 240 F. 2d 564, 570-71 (1st Cir. 1957); *Trailmobile Div., Pullman, Inc.* v. *N.L.R.B.*, 389 F. 2d 195, 196 (5th Cir. 1968); *N.L.R.B.* v. *Mt. Vernon Tel. Corp.*, 352 F. 2d 977, 979 (6th Cir. 1965); *Indiana Metal Prods. Corp.* v. *N.L.R.B.*, 202 F. 2d 613, 617 (7th Cir. 1953); *Gem Int'l, Inc.* v. *N.L.R.B.*, 321 F. 2d 626, 629 (8th Cir. 1963). A different rule may pertain in § 8(a)(1) cases, two of which were relied on by the Court below (21a, n. 24). But see *N.L.R.B.* v. *Rockwell Mfg. Co.*, 271 F. 2d 109, 118 (3d Cir. 1959).

CONCLUSION

For the foregoing reasons, this petition for a writ of certiorari should be granted.

Respectfully submitted,

STUART N. UPDIKE
JOHN R. SCHOEMER, JR.
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Attorneys for Petitioners

November 6, 1968

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Nos. 721 and 722

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IN THE

Supreme Court of the United States

OCTOBER TERM 1968

No.

DEERING MILLIKEN, INC. and
DEERING MILLIKEN & CO., INC.,
Petitioners,

v.

NATIONAL LABOR RELATIONS BOARD
and TEXTILE WORKERS UNION
OF AMERICA, AFL-CIO

No.

DARLINGTON MANUFACTURING COMPANY,
Petitioner,

v.

NATIONAL LABOR RELATIONS BOARD
and TEXTILE WORKERS UNION
OF AMERICA, AFL-CIO

APPENDIX TO PETITIONS FOR CERTIORARI

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COURT OF APPEALS DECREE

UNITED STATES COURT OF APPEALS

FOR THE FOURTH CIRCUIT

No. 11,554

DARLINGTON MANUFACTURING COMPANY;
DEERING MILLIKEN & CO., INC.,
and DEERING MILLIKEN, INC.,
Petitioners,

versus

NATIONAL LABOR RELATIONS BOARD,
Respondent.

TEXTILE WORKERS UNION OF AMERICA, AFL-CIO,
Intervenor.

ON PETITION TO REVIEW AND SET ASIDE AN ORDER OF THE NATIONAL LABOR RELATIONS BOARD.

THIS CAUSE came on to be heard upon the petition of Darlington Manufacturing Company and Deering Milliken, Inc., to review and set aside a Supplemental Decision on Remand, dated June 27, 1967, and an Order, dated October 18, 1962, and readopted by the Supplemental Decision, issued by the National Labor Relations Board in a proceeding entitled "Darlington Manufacturing Company, Deering Milliken & Co., Inc., and Deering Milliken, Inc. and Textile Workers Union of America, AFL-CIO, Case

No. 11-CA-1071"; upon the answer of the National Labor Relations Board to petition to review and set aside, and cross-application to enforce, an order of the Board, after further proceedings before the Board on remand, and upon the certified list in lieu of a transcript of the record; and the said cause was argued by counsel.

UPON CONSIDERATION WHEREOF, it is ordered, adjudged and decreed by the United States Court of Appeals for the Fourth Circuit that the order of the National Labor Relations Board be, and the same is hereby, enforced, and that the said Darlington Manufacturing Company and Deering Milliken, Inc., abide by and perform the directions of the Board in said order contained.

JOHN D. BUTZNER, JR.
United States Circuit Judge.

FILED
MAY 31, 1968
SAMUEL W. PHILLIPS
CLERK

ORDER DENYING REHEARING EN BANC

UNITED STATES COURT OF APPEALS

FOR THE FOURTH CIRCUIT

No. 11,554

DARLINGTON MANUFACTURING COMPANY;
DEERING MILLIKEN & CO., INC.,
and DEERING MILLIKEN, INC.,
Petitioners,

versus

NATIONAL LABOR RELATIONS BOARD,
Respondent.

TEXTILE WORKERS UNION OF AMERICA, AFL-CIO,
Intervenor.

ORDER DENYING REHEARING EN BANC

Upon consideration of the petition for rehearing filed by Darlington Manufacturing Company and Deering Milliken & Company, Inc., and Deering Milliken, Inc.,

It is ADJUDGED and ORDERED:

1. At page 6, n. 9, of the slip opinion, "1960" is substituted for "1966."

2. In the last line of the text on page 20 of the slip opinion, "realization" is substituted for "relation."

3. In the sixth line from the bottom of page 26, "Darlington" is substituted for "Deering Milliken."

Order Denying Rehearing En Banc

And it appearing that the majority, concurring and dissenting opinions sufficiently discuss the issues, and that a rehearing would serve no additional purpose;

It is further ADJUDGED and ORDERED that the petition for rehearing is denied.

CLEMENT F. HAYNSWORTH, JR.
Chief Judge Fourth Circuit

SIMON E. SOBELOFF
United States Circuit Judge

HARRISON L. WINTER
United States Circuit Judge

J. BRAXTON CRAVEN, JR.
United States Circuit Judge

JOHN D. BUTZNER, JR.
United States Circuit Judge

We would grant the rehearing.

HERBERT S. BOREMAN
United States Circuit Judge

ALBERT V. BRYAN
United States Circuit Judge

FILED: August 29, 1968, Samuel W. Phillips, Clerk

COURT OF APPEALS DECISION

UNITED STATES COURT OF APPEALS

FOR THE FOURTH CIRCUIT

No. 11,554

DARLINGTON MANUFACTURING COMPANY;
DEERING MILLIKEN & CO., INC.,
and DEERING MILLIKEN, INC.,
Petitioners,

versus

NATIONAL LABOR RELATIONS BOARD,
Respondent.

TEXTILE WORKERS UNION OF AMERICA, AFL-CIO,
Intervenor.

ON PETITION TO REVIEW AND SET ASIDE, AND ON CROSS-APPLICATION TO ENFORCE, AN ORDER OF THE NATIONAL LABOR RELATIONS BOARD, AFTER FURTHER PROCEEDINGS BEFORE THE BOARD ON REMAND.

(Argued December 5, 1967. Decided May 31, 1968.)

Before HAYNSWORTH, Chief Judge, and SOBELOFF, BOREMAN, BRYAN, WINTER, CRAVEN and BUTZNER, Circuit Judges, sitting en banc.

Thornton H. Brooks, Greensboro, N. C., (McLendon, Brim, Brooks, Pierce & Danieis, Greensboro, N. C., on the brief) for Darlington Manufacturing Co.

John R. Schoemer, Jr., and Stuart N. Updike, New York City, (John D. Canoni, on the brief) for Deering, Milliken, Inc., and Deering, Milliken and Co., Inc.

Frank H. Itkin, Atty., N. L. R. B., (Arnold Ordman, Gen. Counsel, Dominick L. Manoli, Associate Gen. Counsel, Marcel Mallet-Prevost, Asst. Gen. Counsel, and Nancy M. Sherman, Atty., N. L. R. B., on the brief) for respondent.

Daniel B. Jordan, Gen. Counsel, Textile Workers Union of America, AFL-CIO, for intervenor.

BUTZNER, Circuit Judge:

Soon after the Textile Workers Union won an election at Darlington Manufacturing Co., stockholders liquidated and dissolved the corporation. In *Textile Workers* v. *Darlington Mfg. Co.*, 380 U. S. 263 (1965), the Court held that an employer does not engage in an unfair labor practice when he permanently closes his entire business, even if the liquidation is motivated by vindictiveness toward a union. A partial closing, however, "*** is an unfair labor practice under § 8(a)(3)[1] if motivated by a purpose to chill unionism in any of the remaining plants of the single employer and if the employer may reasonably have foreseen that such closing would likely have that effect."[2] The Court

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[1]29 U. S. C. § 158(a)(3), which provides in pertinent part:

"(a) It shall be an unfair labor practice for an employer—

"(3) by discrimination in regard to hire or tenure of employment or any term or condition of employment to encourage or discourage membership in any labor organization***."

[2]*Textile Workers* v. *Darlington Mfg. Co.*, 380 U. S. 263, 275 (1965).

remanded the case to allow the National Labor Relations Board to make findings on the purpose and effect of the closing and to afford this court an opportunity to review the Board's single employer finding and the remedy it proposed.[3]

Upon remand, the Board, disagreeing with the Trial Examiner,[4] found the persons controlling Darlington had sufficient interest and relationship with Deering Milliken, Inc., and other affiliated corporations, to establish a single enterprise; and that Darlington's closing was accomplished under circumstances that established the factors of "purpose" and "effect" with respect to chilling unionism in other mills of the Deering Milliken group. Consequently, the Board concluded that the closing of Darlington's mill

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[3]Charges were filed against Darlington on October 16, 1956. Pertinent reported decisions, culminating in the present petition for review, occurred in the following order:

Darlington Mfg. Co., 119 NLRB 1069, 41 LRRM 1205 (1957) (remand for further proceedings before Trial Examiner).

Darlington Mfg. Co., 139 NLRB 241, 51 LRRM 1278 (1962) (Board's finding of unfair labor practice, and order).

Darlington Mfg. Co. v. *NLRB*, 325 F. 2d 682 (4th Cir. 1963) (enforcement denied).

Textile Workers v. *Darlington Mfg. Co.*, 380 U. S. 263 (1965) (remand for further proceedings).

Darlington Mfg. Co., 165 NLRB No. 100, 65 LRRM 1391 (1967) (Board's supplemental decision. The Board did not modify the order entered in 1962).

See also *Deering Milliken, Inc.* v. *Johnston*, 295 F. 2d 856 (4th Cir. 1961), *modifying* 193 F. Supp. 741 (M.D.N.C. 1961) for a concise statement of the history of this litigation to that date.

[4]While agreeing that the mill would not have closed "but for the protected organizational activities" of Darlington's employees, the Board and the trial examiner reached different conclusions on single employer status and chilling purpose and effect. We have considered the trial examiner's findings in our review of the record as a whole, and we conclude that these findings are of insufficient force to destroy the substantiality of evidence upon which the Board's decision rests. *Universal Camera Corp.* v. *NLRB*, 340 U. S. 474, 493 (1951).

was the partial closing of a business in violation of § 8(a)(3). The Board ordered Darlington and Deering Milliken to pay back wages until the employees obtained substantially equivalent employment or were put on a preferential hiring list by Deering Milliken.

The case is before us on the joint petition of Darlington and Deering Milliken to review and set aside the Board's order and on the cross-application of the Board for enforcement. We hold the Board correctly applied the precepts governing remand and that the Board's findings are supported by substantial evidence on the record as a whole. Accordingly, we enforce the Board's order.

I.

When this case was last before us, we did not review the Board's finding that Darlington and Deering Milliken affiliated corporations were a single employer because we concluded that an employer had an absolute prerogative to terminate its business permanently in whole or in part.[5] Now, however, the single employer issue is crucial, for if Darlington were independent, the liquidation of its business would not be an unfair labor practice. The same conclusion does not necessarily follow, however, if "* * * Darlington is regarded as an integral part of the Deering Milliken enterprise."[6]

Mr. Justice Harlan, writing for the Court, stated the criteria that determine the employer's status, and the ele-

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[5] *Darlington Mfg. Co.* v. *NLRB*, 325 F. 2d 682, 685 (4th Cir. 1963).

[6] *Textile Workers* v. *Darlington Mfg. Co.*, 380 U. S. 263, 274 (1965).

ments that must be established to show an unfair labor practice:[7]

> "While we have spoken in terms of a 'partial closing' in the context of the Board's finding that Darlington was part of a larger single enterprise controlled by the Milliken family, we do not mean to suggest that an organizational integration of plants or corporations is a necessary prerequisite to the establishment of such a violation of § 8(a)(3). If the persons exercising control over a plant that is being closed for antiunion reasons (1) have an interest in another business, whether or not affiliated with or engaged in the same line of commercial activity as the closed plant, of sufficient substantiality to give promise of their reaping a benefit from the discouragement of unionization in that business; (2) act to close their plant with the purpose of producing such a result; and (3) occupy a relationship to the other business which makes it realistically foreseeable that its employees will fear that such business will also be closed down if they persist in organizational activities, we think that an unfair labor practice has been made out.
>
> "Although the Board's single employer finding necessarily embraced findings as to Roger Milliken and the Milliken family which, if sustained by the Court of Appeals, would satisfy the elements of 'interest' and 'relationship' with respect to other parts of the Deering Milliken enterprise, that and

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[7] *Textile Workers* v. *Darlington Mfg. Co.*, 380 U. S. 263, 275 (1965).

> the other Board findings fall short of establishing the factors of 'purpose' and 'effect' which are vital requisites of the general principles that govern a case of this kind."

The facts leading to the Board's finding of a single employer previously have been published.[8] Repetition of all the details is unnecessary. Darlington was chartered by South Carolina in 1883. It operated a mill in Darlington, South Carolina, for the manufacture and sale of cotton greige goods. It had no other plant or office. In 1937, Deering Milliken & Co., a New York corporation,[9] acquired 41% of Darlington's stock through a bankruptcy proceeding. The majority stockholders of Deering Milliken & Co. were members of the Milliken family. In 1956, when Darlington was closed, members of the Milliken family, through their majority ownership of Deering Milliken and Cotwool Manufacturing Corp., and their individual Darlington holdings, controlled about 66% of Darlington's stock.

The Milliken family controlled 17 corporations operating 27 textile mills, of which 20, including Darlington, were in South Carolina. Directors of Deering Milliken constituted a majority of the boards of directors of the mill corporations except one. Deering Milliken was the exclusive sales agent and factor of all 27 mills. It had no non-Milliken clients. The head of Deering Milliken's tax

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[8]See *Darlington Mfg. Co.* v. *NLRB*, 325 F. 2d 682, 687 (4th Cir. 1963) (dissenting opinion); *Darlington Mfg. Co.*, 139 NLRB 241, 51 LRRM 1278 (1962); *Darlington Mfg. Co.*, 165 NLRB No. 100, 65 LRRM 1391 (1967).

[9]In 1960, Deering Milliken & Co., and Cotwool Manufacturing Corp. merged, forming Deering Milliken, Inc., a Delaware corporation.

department was an officer of each corporation. Deering Milliken's insurance department handled insurance for the mills. A single workmen's compensation policy and a single fire policy covered all mills. One attorney advised all mills on labor relations. Products of the mills were sold under the name, "Milliken". Two wholly owned subsidiaries, Deering Milliken Service Corporation, and The Deering Milliken Research Corporation, conducted surveys, inspections, research, and studies for the benefit of all mills. They developed a standard cost system and a uniform preventive maintenance program, and set production goals. The subsidiaries purchased machinery, equipment and cotton, and recruited supervisory and technical trainees for the mills. The day to day manufacturing operations were conducted by the mill treasurers, who were the chief executive officers at each mill. They were granted considerable authority in hiring, firing, wage rates and pricing. They recognized, however, that they were a part of the Deering Milliken group.[10] After Darlington was closed, arrangements were made to carry Darlington supervisory personnel on the payroll of the Deering Milliken Industrial Engineering Department for a three-month period, within which they could be picked up by other Deering Milliken mills. A number of the supervisors were transferred to positions in the Deering Milliken organization.

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[10]For example, the mill treasurer of Darlington, in reporting to the corporation's president, mentioned that pay on a number of jobs "was well above the average of competitive mills within the Deering Milliken group and information we had received on other mills; that we had known for some time that the pay of our overseers was less than the other D. M. mills," and that even with the increases that he proposed, the supervisors' salaries would be "under the mills in the D. M. group."

Roger Milliken was president of Deering Milliken and all the mill corporations except one, for which he served as vice president and member of the board. He was president of Darlington at the time it closed. He kept himself well-informed and frequently advised the mill treasurers on nearly every phase of the mills' operations. No one expressed better than Milliken that he was the head of a well-integrated single enterprise. He wrote of the necessity of "goals for each of the mills in the organization" as a proper subject for discussion at the next meeting of the mill treasurers. He planned to hold quarterly meetings "*** of all our mills at which each one of them will make a presentation to the group of what they have accomplished ***." He went on to say, "So many of the policies of the whole company are developed at meetings like this that I think it would be extremely valuable if you could plan to be present and thus know of all the things that are being done to make the manufacturing of Deering Milliken as outstanding as possible."

Darlington and Deering Milliken have argued that lack of common control of labor policy and absence of substantial identity of ownership negate the Board's single employer finding. The record viewed as a whole supports the Board's finding that Milliken exercised ultimate control over the labor relations of all the corporations. Milliken did not limit his participation in a uniform labor policy to a mere statement of views. For example, when he felt it necessary to clarify a uniform policy on payroll deductions, he issued a directive calling upon his mill officers to observe the group's policy. One attorney, J. D. Poag, represented and advised all mills on labor relations. His employment was not the result of coincidental action taken by independ-

ent mill treasurers. Poag enjoyed Milliken's confidence and had authority to speak for him. In opposing union organization at Darlington, Poag reflected Milliken's policy for all mills, not just Darlington. Finally, it was Milliken, not the treasurer of Darlington, who initiated and pressed the closing of the mill after the union's victory.

The fact that approximately 33% of Darlington's stock was owned by persons who were not members of the Milliken family does not of necessity lead to the conclusion that Darlington and the Deering Milliken affiliated corporations cannot be considered a single employer for the purpose of determining whether § 8(a)(3) was violated. Neither the Board nor the courts have applied a simple mechanistic test of stock ownership to determine single employer status. Identity of ownership may be an indicium of this status, e.g., *NLRB* v. *Calcasieu Paper Co.*, 203 F. 2d 12 (5th Cir. 1953), but it is not indispensable. *NLRB* v. *Gibraltar Industries, Inc.*, 307 F. 2d 428 (4th Cir. 1962), *cert. denied*, 372 U. S. 911 (1963). The Milliken family controlled sufficient stock in the several corporations of the Deering Milliken group to effectively shape the corporate structure of the enterprise. As Judge Bell pointed out in his dissent, the evidence "*** indicates that the separate corporate entities of the Deering Milliken complex were largely paper corporations that could be shifted and changed at the convenience of the Milliken family."[11] Moreover, the Court in Darlington expressly stated that an organizational integration of plants or corporations is not a necessary prerequisite to establish a violation of the Act.[12]

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[11] *Darlington Mfg. Co.* v. *NLRB*, 325 F. 2d 682, 689 (4th Cir. 1963) (dissenting opinion).

[12] *Textile Workers* v. *Darlington Mfg. Co.*, 380 U. S. 263, 275 (1965).

We hold that the evidence considered as a whole supports the Board's single employer finding, which in turn satisfies the elements of "interest" and "relationship", which the Supreme Court required as a predicate to proof of a § 8(a)(3) violation.[13]

II.

The Board found that Darlington's closing was motivated by a purpose to discourage unionism in the remaining Milliken mills. With respect to this element the Court pointed out:[14]

> "It does not suffice to establish the unfair labor practice charged here to argue that the Darlington closing necessarily had an adverse impact upon unionization in such other plants. We have heretofor observed that employer action which has a foreseeable consequence of discouraging concerted activities generally does not amount to a violation of § 8(a)(3) in the absence of a showing of motivation which is aimed as achieving the prohibited effect."

In March 1956 the union began a campaign at Darlington. The mill treasurer promptly informed Milliken, who in turn asked J. D. Poag to go to Darlington and advise the mill treasurer during the campaign. Management waged a vigorous campaign against the union. Included in its tactics were supervisors' threats that the plant would close if the

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[13] *Textile Workers* v. *Darlington Mfg. Co.*, 380 U. S. 263, 276 (1965).

[14] *Textile Workers* v. *Darlington Mfg. Co.*, 380 U. S. 263, 276 (1965).

union won.[15] The union won the election on September 6, 1956. The supervisors' predictions were immediately realized. The day after the election Milliken decided he would recommend to Darlington's directors and stockholders that they close the plant. At a special meeting on September 12 that lasted about 75 minutes, the directors resolved to liquidate Darlington and called a special meeting of stockholders to approve the proposal.[16] The stockholders met on October 17. Milliken opened the meeting with the statement that when the employees voted for a union he decided to close the mill. A majority of the stockholders approved the resolution to liquidate. After the meeting a person opposed to closing pointed out to Milliken that 83% of the employees had signed a petition to go back to work whether or not they had a union. Milliken responded, "As long as there are 17% of these hardcore labor people here I refuse to run the mill."

The mill was closed in November and its assets were sold piecemeal at public auction December 12 and 13. The employees were discharged.

Anti-union animus alone does not establish the petitioners' violation of § 8(a)(3). Moreover, it is insufficient to show only the impact of the closing on Darlington employees. The Supreme Court required a showing of motivation to chill unionism in remaining plants of the Deering Milliken enterprise. The Board's finding that this motive was present is supported by the record as a whole.

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[15]The trial examiner and the Board found these threats violated § 8(a)(1) [29 U. S. C. § 158(a)(1)].

[16]Besides Roger Milliken, the board of directors of Darlington included Milliken's brother, uncle and cousin, all of whom were officers and directors of Deering Milliken in New York. The other Darlington directors were mill treasurer, J. M. Oeland, retired mill treasurer, W. S. Nicholson, and J. H. Lyles, a businessman in the city of Darlington.

The use of prior closings to chill unionism was not unknown in the Deering Milliken group. During the Darlington election campaign the history of Deering Milliken's closed plants was exploited to raise the spectre of Darlington's closing. Poag told the supervisors that Milliken had not said what he would do as far as Darlington was concerned. He added, however, that other mills had closed down where Milliken "had tried to operate with the union."[17] The supervisors understood the message. The record discloses numerous instances in which they told employees that Milliken had closed other mills because of unionization and that he would do the same at Darlington.

The chilling effect of plant closing was part and parcel of Darlington's anti-union campaign. Significantly this tactic did not end with Darlington's election. On November 14, 1956, after the decision to close Darlington, Milliken sent a memorandum to thirty-six mill treasurers and other officials of Deering Milliken affiliated corporations that stated:

> "Attached hereto is an article from the November eighth issue of *America's Textile Reporter*. I am sending it to you in case you have not had an opportunity to see it. It is apparent from this article

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[17] J. M. Oeland, Darlington's mill treasurer, testified concerning Poag's address to the supervisors before the election:

> "Q. Did Mr. Poag ever say you can tell the employees what had happened in some of these other plants, but you cannot tell them that the plant closed down on account of the union? A. He made the statement that Mr. Milliken had not said what he would do as far as Darlington was concerned.
>
> "Q. Right. A. But that there had been other mills that had closed down.
>
> "Q. He did mention that fact? A. Yes, that other mills had closed down where Mr. Milliken had tried to operate with a union."

> that this magazine made a real investigation in Darlington, and for that reason, I think the article is interesting.
>
> "While this article shows that the union leaders definitely misled the people, it also points out that the mill was negligent in its public relations. I hope that you will read this second part of the article carefully and review in your mind the steps that you are taking to bring about an understanding of your mill and its problems in your community. The unions are going to be making a tremendous drive all through this area, and there are few things that are more important to us than making sure that the leaders in your community understand and are sympathetic to what you are trying to do."

The article Milliken commended was headlined, "Darlington Situation Becomes Object Lesson to All Concerned." The article spoke of the "workers' unfortunate choice" and reported that business in the town of Darlington was depressed because the mill had closed. It stressed the need and value of good public relations as a lesson to be learned from the Darlington affair. Milliken also enclosed an editorial from America's Textile Reporter of the same date as the article, which said in part:

> "If the people of Darlington knew anything of the Deering Milliken record they would know that management does not intend an unprofitable division nor has it intended to share the prerogatives of management with labor union leaders. This has been the case through three generations of Milliken opera-

> tions. When the Madison Woolen Mills of Madison, Maine, became not only unprofitable but unionized, Mr. Gerrish Milliken liquidated it, although the Cowan and Farnsworth Mills in the State of Maine still operate and must, therefore, be profitable. When the Dallas Manufacturing Company of Huntsville, Alabama, became unionized, the Millikens liquidated it, contrary to the opinion of many local people that such would not be the case. We ourselves are small shareholders in Darlington and from experience and acquaintanceship, we knew the minute the union election was announced that we would receive a call for a special meeting to vote for liquidation."

Milliken also enclosed a news clipping that reported the permanent closing of a unionized mill in Massachusetts.

The Board found that the memorandum and its attachments were important on two counts. First, they demonstrated Milliken's opinion that the unions were in the process of mounting a drive through the area, and second, the results of a failure of public relations were made clear. Milliken drove home to the mill managers the tradition of three generations of Millikens who closed unionized mills in Maine, Alabama and Darlington. Milliken's memorandum, however, was not limited to the dissemination of his views. It contained a directive to review the steps being taken to bring about an understanding in the community of the Deering Milliken mills and their problems. It stressed the importance of the mill treasurers' "making sure that the leaders in your community understand and are sympathetic to what they are trying to do." The Board commented, "The only way that community leaders could make use of this information would be by impressing upon em-

ployees the risks of unionism; an emphatic and timely example of those risks was Darlington."[18]

Deering Milliken urges that the Board's reliance upon Milliken's memorandum and two of his speeches was impermissible under § 8(c) of the Act.[19]

The memorandum was admissible. It was not merely the expression of Milliken's views, argument or opinion, which alone are privileged under § 8(c). The memorandum was a directive to the mill treasurers and other officials to review their public relations in the light of the enclosures. The enclosures emphasized that union representation leads to the closure of Deering Milliken mills.

Milliken's memorandum falls within the exclusions from § 8(c) about which Senator Taft wrote in his Memorandum of Legislative Intent dated June 5, 1947:[20]

> "It should be noted that this subsection is limited to 'views, arguments or opinions' and does not cover instructions, directions, or other statements which might be deemed admissions under ordinary rules of evidence. In other words, this section does not make incompetent, evidence which would ordinarily be deemed relevant and admissible in courts of law."

The distinction Senator Taft drew is emphasized by his further remarks:[21]

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[18] *Darlington Mfg. Co.*, 165 NLRB No. 100, 65 LRRM 1391, 1398 (1967).

[19] Title 29 U. S. C. § 158(c)—"The expressing of any views, argument, or opinion, or the dissemination thereof, whether in written, printed, graphic, or visual form, shall not constitute or be evidence of an unfair labor practice under any of the provisions of this subchapter, if such expression contains no threat of reprisal or force or promise of benefit."

[20] *2 Legislative History, National Labor Relations Act, 1947*, p. 1541 (Government Printing Office 1948).

[21] *2 Legislative History, National Labor Relations Act, 1947*, p. 1624 (Government Printing Office 1948).

> "It has been argued, however, that the prohibition against using expressions of opinion as evidence goes much further than the rules with respect to admissibility in criminal or civil trial. Senators making this argument overlook the fact that the privilege of this subsection is limited to expression of 'views, arguments, or opinion.' It has no application to statements which are acts in themselves or contain directions or instructions."

We conclude that Milliken's memorandum of directions and instructions, and its illustrative enclosures, written after the decision to close the plant had been taken, were not simply an expression of his views, arguments or opinions. Section 8(c) did not render the memorandum and its attachments inadmissable.[22]

The Milliken speeches stand on a different footing. Both speeches, delivered to businessmen and state officials months before the Darlington election, disclosed Milliken's belief that the textile industry in South Carolina should remain non-unionized. The Board carefully limited its consideration of these speeches, saying:[23]

> "Whatever limitations Section 8(c) might impose in other circumstances upon the use of employer expressions of antiunion sentiment, the purpose for which we here consider these speeches does not violate that provision. In this case, we look to Milliken's speeches not simply as proof that he closed Darlington because of the Union (a settled matter,

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[22]Cf. *Linn* v. *United Plant Guard Workers,* 383 U. S. 53, 62 n. 5 (1966).

[23]*Darlington Mfg. Co.,* 165 NLRB No. 100, 65 LRRM 1391, 1397 (1967).

> we believe), but as evidence of both his apprehension of an anticipated large-scale union campaign and of his belief that an industrywide response was imperative. These two speeches clarify the scope and breadth of the antiunion considerations which led to the Darlington closing, and we think that Section 8(c) was not intended to interdict evidence offered for this purpose."

We believe that § 8(c) did not prohibit the Board from considering the speeches for the limited purposes mentioned in its decision. The use of protected statements "* * * to draw the background of the controversy and place other non-verbal acts in proper perspective" has been sanctioned.[24]

Even if §8 (c) is considered to bar the speeches, their admission does not require that enforcement of the Board's order be denied. The speeches revealed nothing of substance not shown by other evidence. The speeches neither add to, nor detract from, the evidence necessary to support the Board's decision.

Deering Milliken also argues that the six months' limitation found in § 10(b) [29 U. S. C. § 160(b)] proscribes the Board's use of the speeches. Neither speech, however, was an unfair labor practice. The unfair labor practices found by the Board were well within the six-months' limitation period. The speeches were utilized only to clarify

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[24] *UAW* v. *NLRB*, 363 F. 2d 702, 707 (D. C. Cir.), *cert. denied*, 385 U. S. 973 (1966); *Hendrix Mfg. Co.* v. *NLRB*, 321 F. 2d 100, 103 (5th Cir. 1963).

But *cf. NLRB* v. *Colvert Dairy Products Co.*, 317 F. 2d 44 (10th Cir. 1963); *NLRB* v. *Rockwell Mfg. Co.*, 271 F. 2d 109 (3rd Cir. 1959), where protected statements could not be used to appraise the credibility of witnesses, or to find otherwise proper interrogatories and statements coercive.

and shed light on events which occurred within the limitations period. This use is not prohibited by § 10(b). See *Local 1424, Int'l Ass'n of Machinists* v. *NLRB*, 362 U. S. 411, 416 (1960) (dictum); *NLRB* v. *Craig-Botetourt Elec. Co-op.*, 337 F. 2d 374 (4th Cir. 1964).

The petitioners, Darlington and Deering Milliken, urge that the mill was closed for economic reasons. They point out that in August 1956, a month before the union election, the mill treasurer reported an estimated loss of $40,000 for the current year. It also appeared that a loss of $240,000 could be anticipated for the following year. The petitioners stress that Darlington was an old mill, that it had lost its traditional market, that foreign imports adversely affected its competitive position, that it was faced with low market prices and high production costs, and that a modernization program would be expensive and would meet with employee resistance.

After reviewing testimony supporting these allegations, we conclude that it did not require the Board to find Darlington was closed because of economic factors. During the first nine months of 1956 a capital improvement program involved expenditures in the amount of $400,000. In September 1956 construction changes were being undertaken to accommodate newly purchased looms. The mill continued to operate and the capital improvement program was uninterrupted until after the employees voted to join the union. Milliken did not call a special meeting of the board of directors to close the company or halt the capital improvement program when he learned of the prospective $40,000 loss. Despite the economic problems the petitioners stress, three directors were not told before the meeting in September 1956 that a plant closing was under consideration. From

these and other facts mentioned elsewhere in this opinion, we find adequate support for the Board's finding that the decision to close the mill was not based on economic factors, and that it would not have been made but for the protected organizational activities of the employees.

Darlington points out that all the directors testified to the effect that the plant was not closed to chill unionism.[25] It suggests that the Board concentrated exclusively on Milliken's motive and that "to assume that six of Darlington's seven directors voted for liquidation merely because Roger Milliken proposed it is to assume, without support in the record, that they unlawfully ignored their fiduciary duties." We do not find this argument persuasive. The record shows that Milliken interests controlled Darlington and that Roger Mliliken occupied a dominant role in the management and control of these interests. The Board did not have to shut its eyes to the fact that corporate directors are frequently responsive to interests that control the majority of a corporation's stock. This response does not necessarily demonstrate breach of the directors' fiduciary duties. Furthermore, it was the stockholders who ultimately liquidated the corporation. The Milliken interests held control of the corporation and voted a majority of the stock for liquidation. Some non-Milliken stock, unnecessary to produce a majority, was also voted for a liquidation. Other minority stockholders who had no interest in the remaining Deering Milliken mills voted against liquidation.

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[25]The trial examiner did not credit or discredit this testimony. Concerning it he said:

> "The statements of purpose are negative, and whoever would regard them with skepticism cannot rely on them as proving the contrary. The testimony now received from the Darlington directors and stockholders supports the original finding that Darlington would not have been liquidated in 1956 but for the Union and its election victory."

The Board found "the closing of Darlington was, at least in part, the product of a desire to discourage unionism among employees at other Deering Milliken Mills."[26] Deering Milliken argues that the Board's decision is fatally defective because it fails to find that a chilling purpose was the predominant, or at least substantial and determining, cause of the Darlington closing. Deering Milliken asserts, "The theme that ran throughout [the Board's] 1962 decision was that the dominant motive behind the closing was the punishment of Darlington's employees for exercising their § 7 rights. * * * [The Board] cannot consistently now say that but for a purpose to chill elsewhere, Darlington would not have closed." (Brackets added)

We do not find the Board's position in 1962 to be mutually exclusive of the position that it took in 1967. In 1962 the Board viewed Darlington's reprisal against its own employees as prohibited discrimination. Consequently, there was no occasion for the Board to consider whether the Deering Milliken interests pursued the compatible objective of thwarting unionization at other plants. Nevertheless, the record, as it existed in 1962, was not wholly devoid of evidence that showed the chilling purpose of

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[26] *Darlington Mfg. Co.*, 165 NLRB No. 100, 65 LRRM 1391, 1399 (1967). The Board had previously found and unequivocally stated "that the election of the union was a substantial cause of the plant's closing." *Darlington Mfg. Co., supra* 65 LRRM at 1394. Antiunion animus need not be the sole cause of the employer's conduct in order to establish a violation of § 8(a)(3). It is sufficient if it is the moving cause, a substantial cause, or the immediate cause. See *Filler Products, Inc.* v. *NLRB*, 376 F. 2d 369, 377 (4th Cir. 1967); *NLRB* v. *Associated Naval Architects, Inc.*, 355 F. 2d 788, 792 (4th Cir. 1966); and *NLRB* v. *Preston Feed Corp.*, 309 F. 2d 346, 350 (4th Cir. 1962).

Darlington's closing. When this case was previously before the court, two dissenting judges pointed out:[27]

> "The Darlington mill was but a small unit in a vast industrial empire employing more than 19,000 persons owned and controlled directly or indirectly by the Milliken family. Its closure was intended to be and was a grim deterrent to thousands of employees in the affiliated plants who might entertain similar notions of unionization."

We conclude it was sufficient for the Board to find that the election of the union was a substantial cause of Darlington's closing and that the employer was actually motivated, at least in part, by a purpose to chill unionism in other Deering Milliken mills. The coexistence of this chilling purpose with an anti-union purpose directed against Darlington employees does not impair the Board's decision.[28]

III.

Finally, the Board found "* * * that the relationship of the persons closing Darlington to the other businesses was such as to make it realistically foreseeable that employees of the latter would fear that their mills also would be closed if they engaged in organizational activity; that the persons exercising control over Darlington did, in fact, foresee and intend this effect, and that a number of these employees were, in all likelihood, so affected."[29]

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[27] *Darlington Mfg. Co.* v. *NLRB*, 325 F. 2d 682, 691 (4th Cir. 1963) (dissenting opinion).

[28] See *Textile Workers* v. *Darlington Mfg. Co.*, 380 U. S. 263, 273 n.19 (1967); *NLRB* v. *Preston Feed Corp.*, 309 F. 2d 346, 350 (4th Cir. 1962).

[29] *Darlington Mfg. Co.*, 165 NLRB No. 100, 65 LRRM 1391, 1405 (1967).

Deering Milliken contends that a violation of the Act must be predicated upon a finding that an organizing campaign was actually under way in the employer's remaining businesses at the time of the closing. It buttresses this argument by quoting from the Supreme Court's opinion, "[It must be] realistically foreseeable that its employees will fear that such business will also be closed down if they persist in organizational activities***."[30] Deering Milliken argues "Actions which are being persisted in are actually occurring, not foreseeable," and there is a "difference between the realization of an immediate benefit (cooling off a current union campaign) and a future one (discouraging the union from starting a hypothetical campaign at some future and unknown date)."

Along with the Board, we do not read such a fine distinction in the word *persist*. *Motor Repair, Inc.*, 168 NLRB No. 148, 67 LRRM 1051 (1967), illustrates the Board's rule. There the employer closed its Birmingham repair shop (one of six it operated) and discharged its employees there "to penalize them for having selected the union as their bargaining agent." The trial examiner found this conduct violated § 8(a)(3). The Board found that the closing was not an unfair labor practice, saying:

> "Having reviewed the record in the light of the foregoing tests [Textile Workers v. Darlington, 380 U. S. 263 (1965)], we conclude that the evidence does not preponderate in favor of a finding that, in closing the Birmingham shop, Respondent was motivated by a desire to chill unionism at its other

[30] *Textile Workers* v. *Darlington Mfg. Co.*, 380 U. S. 263, 276 (1965).

> shops. Thus, there is no evidence that contemporaneous union activity existed at other shops, or that the union's organization of the Birmingham shop was a first step, *or was believed by Respondent to be a first step, of an effort to organize all of the shops.*" (Emphasis added)

We hold that contemporaneous organizational activity in the other plants is not a prerequisite to finding an unfair labor practice. It is sufficient if the employer anticipated such activity in the reasonably near future. Proof of this is supplied by Milliken's memorandum of November 14, 1956. "The unions are going to be making a tremendous drive all through this area * * *."

There can be no doubt that the persons controlling Darlington could realistically foresee that news of its closing soon after the election would be communicated to many other Deering Milliken employees. Even before the stockholders' meeting, the directors' recommendation was reported extensively throughout South Carolina, where Deering Milliken had nineteen other affiliated mills, one of which was only fourteen miles from Darlington. Predictably, news of the stockholders' meeting and the auction of the plant equipment was widely published. The testimony of employees at other Deering Milliken mills justifies the Board's finding that "conversations about Darlington between employees, and between employees and supervisors, were commonplace at other mills, and this might well be expected."[31] Discussion of Darlington included the proph-

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[31] *Darlington Mfg. Co.*, 165 NLRB No. 100, 65 LRRM 1391, 1403 (1967).

We have considered the petitioners' attack on the credibility of these witnesses. Although discrepancies appear in their testimony,

ecy that other mills would be closed if they were organized.

In reaching its decision, the Board concluded it was unnecessary to show the subjective effect of the Darlington closing on other Deering Milliken employees. Instead the Board reasoned that it should apply the usual standard of whether the closing had a natural tendency to discourage union adherents in other plants.

The petitioners contend that the Board (but not the trial examiner) misread its instructions from the Supreme Court and that an actual chilling effect was required to be shown. Pointing to the 30,000 mill employees, Deering Milliken asserts, "The fatal defect in the Board's finding as to 'effect' is that not one witness was found to testify that he was discouraged by the Darlington closing from persisting in, or even initiating, any organizational activities in his own mill."

We believe the standard the Board adopted is proper. The Supreme Court did not remand to determine the subjective effect of the closing on employees at other Deering Milliken mills. Instead, it spoke in terms of an effect that was realistically or reasonably foreseeable. The Board carefully distinguished between the employer's subjective motive, interest or purpose to chill unionism elsewhere—

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the Board's conclusion that the discussion of Darlington's closing was widespread throughout the other plants was clearly warranted. The witnesses testified to events that occurred almost a decade before. Recognizing this difficulty, the trial examiner said: "Should detailed findings concerning each witness' testimony be deemed necessary, although I deem it unlikely where the sum total is so slight, they can be made free of my own impression of inadequacies and without any confirmatory evaluations of witnesses' demeanor."

which has been shown[32]—and the subjective effect on employees in remaining mills—which need not be shown. To adopt the view expressed by Deering Milliken would require a subjective probing of employees, previously deemed unnecessary.[33]

To remedy the violation the Board directed Deering Milliken to offer to rehire the Darlington employees at other mills, to pay their transportation expenses, or if work were not available, to put them on a preferential list for hiring. The Board also ordered Darlington and Deering Milliken to make whole the employees for any loss of pay until they obtained substantially equivalent employment or were placed on Deering Milliken's preferential hiring list.[34] The Supreme Court did not pass upon the Board's order. It did, however, suggest "* * * a possible remedy open to the Board in such a case, like the remedies available in the 'runaway shop' and 'temporary closing' cases, is to order reinstatement of the discharged employees in the other parts of the business."[35]

We find the remedy is appropriate. Requiring reinstatement and back pay is not an innovation. Substantially similar remedies, albeit involving fewer employees, were ordered in *NLRB* v. *Missouri Transit Co.*, 250 F. 2d 261 (8th Cir. 1957) (partial closing of a business); *NLRB* v.

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[32]*Cf. NLRB* v. *Brown*, 380 U. S. 278, 286 (1965); *Teamsters Union* v. *NLRB*, 365 U. S. 667, 677 (1961) (concurring opinion); *Radio Officers Union* v. *NLRB*, 347 U. S. 17, 42 (1954).

[33]*Radio Officers Union* v. *NLRB*, 347 U. S. 17, 50 (1954). *Cf. NLRB* v. *Associated Naval Architects, Inc.*, 355 F. 2d 788, 791 (4th Cir. 1966); *Hendrix Mfg. Co.* v. *NLRB*, 321 F. 2d 100, 105 (5th Cir. 1963).

[34]*Darlington Mfg. Co.*, 139 NLRB 241, 253, 51 LRRM 1278, 1284 (1962).

[35]*Textile Workers* v. *Darlington Mfg.* Co., 380 U. S. 263, 275 (1965).

Preston Feed Corp., 309 F. 2d 346, (4th Cir. 1962) (runaway shop); and *NLRB* v. *Wallick*, 198 F. 2d 477 (3rd Cir. 1952) (runaway shop).

The Board deemed the back pay award essential to rectify the violation of § 8(a)(3). It did not, however, order the back pay to run until reinstatement occurred, which is the customary remedy for discriminatory discharges. Instead the Board ordered back pay only until the discharged employees were able to obtain substantially equivalent employment, and it allowed the petitioners to terminate back pay liability by placing the discharged employees on a preferential hiring list at other Deering Milliken mills. The Board also recognized that the petitioners might have a superseding, lawful reason for terminating or reducing back pay liability, such as showing that as of a particular date Darlington would have closed its mill or laid off employees even if they had not voted for the union. Provision is made in the Board's order for an opportunity to show mitigating circumstances at the compliance stage of the proceeding.

Deering Milliken urges that the back pay award should be tolled because the examiner recommended dismissal of the complaint and it was entitled to rely upon that decision until the Board reversed. For many years the Board followed the policy of tolling a back pay award when the trial examiner found in favor of the employer. The Board established its present practice of generally refusing to toll back pay in *APW Products, Inc.* 137 NLRB 25, 50 LRRM 1042 (1962), *enforced* 316 F. 2d 899 (2d Cir. 1963). Its policy was restated and clarified in *Farrell Hicks Chevrolet, Inc.*, 160 NLRB 134, 63 LRRM 1177 (1966). There the Board explained that an employer generally has no equitable

standing for tolling an award when the unfair labor practice is based on a § 8(a)(3) complaint. In these cases the discharge usually is prompted by an unlawful intent to discourage union activity, and the policy of the Act dictates that the resulting financial burdens should be placed upon the violator of the Act and not the employee against whom the discrimination has been directed. Only when the employer was not motivated by an unlawful intent does the Board now consider tolling. The Board's application of its rules to this case is not arbitrary or capricious, and we find no compelling reason for requiring it to revert to tolling practices discontinued many years ago.

Deering Milliken also urges that the Supreme Court's tests of "interest" and "relationship" appear somewhat less exacting than the traditional single employer test and relate only to the standards for determining whether Darlington has violated the Act. These tests, Deering Milliken contends, are insufficient to impose vicarious remedial liability on Deering Milliken or on other corporations in its group. We do not agree. We find nothing in the Supreme Court's opinion to suggest that the single employer test should be more rigorous with respect to remedy than it is with regard to violation. The Court does not suggest the Act confers on employees a right without a remedy.

It is the Board which is charged with fashioning a remedy to effectuate the policies of the Act. "Within this limit the Board has wide discretion in ordering affirmative action * * *. The particular means by which the effects of unfair labor practices are to be expunged are matters 'for the Board not the courts to determine.' * * * [The Board's order] should stand unless it can be shown that the order is a patent attempt to achieve ends other than those which can fairly be said to effectuate the policies of

the Act." *Virginia Elec. & P. Co.* v. *NLRB*, 319 U. S. 533, 539 (1943). [Brackets added.]

V.

The Board also found that Darlington threatened the employees that the mill would be closed if the union won the election; told the employees after the election that the mill had been closed for this reason; supported a petition to disavow the union; and interrogated the employees with respect to their activities in behalf of the union. This conduct was held to violate § 8(a)(1) of the Act. These findings need no extended discussion. They are amply supported in the record. The Board also found a violation of § 8(a)(5) because Darlington refused to bargain; that the discharge of the employees constituted a violation of § 8(a)(1); and that Darlington violated § 8(a)(5) by refusing to bargain with respect to the tenure of employment of the Darlington employees and by refusing to furnish the Board with wage and related information. The validity of these findings is based upon the finding that the closing of the mill violated § 8(a)(3) and requires no further discussion.[86]

Enforcement granted.

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[86] *Textile Workers* v. *Darlington Mfg. Co.*, 380 U. S. 263, 267 n. 5 and 6, 268 n. 8 (1965).

Court of Appeals Concurring Opinion

HAYNSWORTH, Chief Judge, concurring:

I generally join the judgment of the court, but not without some misgivings springing principally from the conduct of the independent stockholders and directors.

I have no doubt that any executive in the position of Roger Milliken would not have approached the closure of Darlington, whether or not a union was in the picture, without careful thought to the effect of the closure upon employees of other mills under his general management. Anything less would have been managerial imprudence. In light of the proof of his purpose to avoid unionization elsewhere, therefore, I can readily accept the finding that he expected Darlington's closure so soon after the election to serve the purpose of a dramatic warning to employees of other mills.

The difficulty in accepting the Board's other findings, for me, stems principally from the concurrence of Darlington's independent directors and stockholders, for they had no discernible interest in labor relations at other mills. Two of the directors were truly independent. One of them was a former treasurer of Darlington, but he was then retired and resident in the town of Darlington, while the other was a Darlington businessman without even a former history of employment by any Deering-Milliken related enterprise. Those directors, as directors, and they and other independent stockholders representing a third of the outstanding stock, were totally unconcerned with Milliken's present or prospective managerial problems in other mills. Their only interest was that of Darlington's stockholders, qua stockholders, except that those two directors and other stockholders resident in Darlington may have been influenced against the closure by its adverse impact upon

other businesses in that small town. Their interest, therefore, indisputably was to oppose closure of the plant unless closure was dictated by the economic hopelessness of continued operation.

While Roger Milliken was the dominant individual in the management of all of the corporations, he had no power of control over the independent stockholders and directors on the question of plant closure. He could not ask them to sacrifice their financial interest for the sake of some anticipated advantage to Milliken elsewhere. Nor were they in a position of helplessness. If a purpose to chill unionization elsewhere was the procuring cause of the votes of the majority of the directors and of the Milliken stockholders, they committed a gross breach of their fiduciary duty to the minority stockholders, for which the courts provide injunctive and compensatory remedies. Armed with the weapons the minority had, there was no occasion for supine acquiescence; they had every incentive to fight for their own financial interest, and, if pointed toward continued operation of the mill, for the financial interests of their fellow townsmen.

If the independent, minority directors and stockholders, except those few dissenting stockholders, were convinced that subsequent operation of the mill was not in their economic interest, as they clearly were, it is difficult to ascribe a different controlling purpose to the majority. Closure of antiquated textile mills is far from unknown in the South as in the East, and everything in this record points to the conclusion that Darlington's days were numbered. The capital improvement program does not militate against the conclusion, for the capital expenditures were concentrated in movable machinery, not in brick and mortar or in such

equipment as air conditioning, in which installation charges constitute a large proportion of the cost, and cost recovery is dependent upon subsequent successful operation. The expenditures were entirely consistent with last efforts to retrieve a dying venture and contain no suggestion of a willingness to reconstruct the building to one of modern efficiency or to incur all of those other costs which would have been necessary to convert the plant to other fabrics which might have been sold profitably. In short, on this score, the only open question on the record appears to have been not whether Darlington might have survived, but when its demise would have occurred.

On the question of timing, however, it seems to me there is a basis in the record for the Board's findings. No one contends that the relation in time between the election and the decision to suspend operations was fortuitious or coincidence. It may be, as Darlington contends, that the election result simply made a bleak prospect more dismal, but the record is not devoid of support for the inference that Roger Milliken was substantially motivated to move when he did with a purpose to salvage what advantage he could from a dramatic example to the employees of other plants. It is clear that the independent directors would have made no such move at that time, for the subject of plant closure had not been discussed, and there is no showing that they had been shown the projections of the next year's losses. To the extent, therefore, that Roger Milliken was influenced by his interest in labor relations at other Milliken controlled mills and that his actions may be said to have been prompted by mixed motives, consistent with each other, the inference that his concern about other plants was not insubstantial is not so tenuous as to warrant our rejection. There is room for a difference of opinion as to whether, without a thought

of the other plants, he would have moved when he did or waited for the next regularly scheduled directors' meeting. A leisurely approach to the avoidance of projected heavy losses is not to be expected, but there is room in this record for the inference, drawn by the Board, that his action was more precipitate than it would have been had he been unconcerned about the employees of other plants.

The choice between permissible inferences, of course, is for the Board, not the Court, and, to the extent I have indicated, I think the inference the Board drew was a permissible one.

As the principal opinion notices, the duration of any back pay period has been left for determination in compliance proceedings, and there is no occasion for us to address ourselves to that matter, except that I would note that one cannot reconcile the emphatic evidence of the conduct of the independent directors and stockholders with any notion that Darlington had more than a very brief expectancy.

Finally, I would relieve Darlington of its joint obligation to discharge any back pay awards. It has liquid assets available for distribution to its stockholders subject to the payment of such awards. Equitably, a third of the fund belongs to the independent stockholders, who have committed no unfair labor practice. If an unfair labor practice was committed, as the Board found, it was committed by Roger Milliken and his associates for the supposed benefit and advantage of other Milliken enterprises, not in the least for the advantage of Darlington's stockholders. I think Deering-Milliken should alone shoulder the burden of payment of any back pay award.

Court of Appeals Dissenting Opinion

BRYAN, CIRCUIT JUDGE, Dissenting:

The Supreme Court's prefatory recount of the facts, 380 U. S. 263 (1964), necessarily taken from the Board's findings, discloses a complete knowledge of all of the conduct and tie-ins which are now the predicate of the majority opinion. These premises the Supreme Court declared fell "short of establishing the factors of 'purpose' and 'effect' which are vital requisites of the general principles that govern a case of this kind." The controversy was remanded to the Board to make further findings.

Nothing significantly new was introduced *after* the remand. This is the observation of the trial examiner who heard the evidence on the return of the case to the Board. Indeed, this is manifest too in the majority's reliance now on what was said in dissent here, of course *before* the appeal. 325 F. 2d 682, 689 (1963). My difficulty is understanding how our Court sees the facts as supporting "purpose and effect" where the Supreme Court could not.

A single director's, Roger Milliken, statements, writings and attitude are now imputed to the entire board of directors, and a majority of the stockholders, of Darlington by the Court to sustain the NLRB's finding that both the purpose and foreseeable effect of the plant closure was to "chill unionism" in the other Milliken plants. All of the power of Roger Milliken, and the entire linkage of Darlington with the other Milliken corporations, upon which the Court now counts, were known to the Supreme Court when it decided this case, and yet it did not think this evidence sufficient to arrive at the judgment now delivered by our majority.

The answer is that for its support the majority draws inferences and makes assumptions which are not warranted by the proof. With nothing to sustain it, the majority terms some of the Milliken units as "paper corporations". Also, it adopts a sweeping implication that their directors would do just exactly what Roger Milliken wished, for fear they be at once removed and replaced by him to register his views. This undeserved derogation of the directors stands refuted both by the absence of evidence to establish it, and by obstinate facts and testimony exactly opposite.

Darlington was closed for economic reasons according to its directors. At least they said so and gave the basis of their determination. The NLRB recognized this fact. In its supplemental decision it admitted that,

> "[a]ccording to the testimony in this case, the financial condition of Darlington was discussed at the board meeting. It was brought out that Darlington had averaged less than a 3 percent return on invested capital in the previous 5 years, including the current year in which a loss of $40,000 was expected, and that, if market prices did not rise or costs decrease, a loss of $240,000 could be anticipated in the following year."

There was no impeachment of the Darlington board's word save NLRB's argument, now accepted by the majority, that the members' votes were nothing more than echoes of Roger Milliken's partisanship. Truth is, the directors were persons of conviction and *unquestioned* character. There were 7 including Roger Milliken, and 3 of them had no interest in any other Deering Milliken corporations. The remaining 3 were connections of the Milliken family.

The relationship alone does not impugn their evidence on the economic advisability of the plant closing.

The stockholders must also be found unworthy of belief, for they voted to ratify the directors' action. Additionally, the directors of Cotwool and Deering-Milliken must also be condemned in similar fashion. Each board voted, in favor of the closure, all of the Darlington shares held by its corporation, constituting a majority of Darlington's outstanding stock.

The NLRB's supplemental decision, upheld by the court, tells Darlington that it did not have a right to liquidate after the union election but instead should have made that decision prior to the election. With the financial losses that Darlington was currently sustaining, the corporation reasoned quite realistically that the foreseeable additional costs resulting from the arrival of the union, would be simply too much for the corporation to bear. Surely this consideration may be indulged, and acted upon, without offense to the National Labor Relations Act—indeed even if it be a mistaken conclusion.

The Trial Examiner emphasized that, "I find and conclude from all of the testimony . . . at this hearing, *confirmed* by that *previously* received, that a purpose at Darlington with respect to employees elsewhere has not been shown; and that testimony concerning related events at other mills is slight, considering quantity and credibility, and that such events can not be causally traced to a chilling purpose at Darlington." (Accent added.)

I think it appalling that the Board and the courts may step into a business and tell the directors that their judgment of the economics of their business was not correct, that it did not warrant the closing of their plant and that

in reality they were evilly motivated in reference to union organization. More astounding, the Board presumes to know better than do the directors the basis for their decision—that they were simply paying servile obeisance to another.

I would not enforce the Board's order.

Judge BOREMAN authorizes me to state that he joins in this dissent.

NATIONAL LABOR RELATIONS BOARD
SUPPLEMENTAL DECISION

UNITED STATES OF AMERICA

BEFORE THE NATIONAL LABOR RELATIONS BOARD

Case No. 11-CA-1071

DARLINGTON MANUFACTURING COMPANY,
DEERING MILLIKEN & CO., INC., and
DEERING MILLIKEN, INC.,

and

TEXTILE WORKERS UNION OF AMERICA, AFL-CIO.

SUPPLEMENTAL DECISION ON REMAND

On October 17, 1956, the stockholders of Darlington Manufacturing Company voted to liquidate the cotton mill operated by the Company in Darlington, South Carolina. This action followed closely a representation election, held on September 6, 1956, in which a majority of the employees of Darlington had selected the Textile Workers Union of America to represent them for purposes of collective bargaining. The Union, the Charging Party here, filed unfair labor practice charges against the Company with the National Labor Relations Board, alleging, *inter alia,* that the liquidation (completed by December 17, 1956) constituted a violation of the National Labor Relations Act, as amended, primarily of Section 8(a)(3), the provision that condemns discriminatory action taken by an employer to discourage

union membership. The charges also alleged that, in various ways, Darlington had unlawfully refused to bargain with the Union, thus violating Section 8(a)(5) of the Act, and that, both prior to and after the election, Darlington had engaged in numerous independent violations of Section 8(a)(1), which provision forbids coercion or interference directed against the fundamental right to act collectively, assured to employees by Section 7. An extensive series of legal proceedings,[1] including amendments to the complaint naming Deering Milliken & Co., Inc., and its successor, Deering Milliken, Inc., as additional respondents culminated in a Decision and Order issued by this Board on October 18, 1962. In that Decision, reported at 139 NLRB 241, a majority of the Board found that Respondent Darlington had closed its plant at least partly because the employees had chosen to organize; that this action violated Section 8(a)(3); that employees are not left remediless when their employer discharges them *en masse* for anti-union reasons, even though the discharge may take the form of termination of his entire enterprise; that Darlington and the affiliated Deering Milliken corporations were essentially a single employer, jointly and severally liable to remedy the unfair labor practices committed at Darlington; and that these Respondents were also to be held accountable for the violations found under Section 8(a)(5) and (1). The Board ordered the Respondents to reimburse the discharged employees for wages lost from the time of discharge until they were offered reinstatement or placed on preferential hiring lists in other Deering Milliken-controlled mills, ordered Respondents to bargain with

[1] Described in detail at 139 NLRB 241, 242.

the Union about the reemployment procedures, and required advertising and mailing of the customary notices.

On review, the Court of Appeals for the Fourth Circuit, sitting *en banc,* denied enforcement. 325 F. 2d 682. The Court of Appeals (Judges Bell and Sobeloff dissenting) held that, accepting *arguendo* the Board's findings of motive and single employer, an employer has an absolute right to close out his business, in part or in whole, even if his action is "spurred by unionization." The Court accordingly found no violation of Section 8(a)(3). Additionally, it held that the 8(a)(5) and (1) offenses were not subject to remedy "as Darlington is no longer alive."

Having granted certiorari, the Supreme Court affirmed the Court of Appeals insofar as it had ruled that an employer may entirely terminate his business for any reason, including a desire to spite the union, without incurring liability. 380 U. S. 263. The Court disagreed, however, with the further holding of the Court of Appeals that all permanent *partial* closings are similarly lawful. It ruled instead that the permanent closing of part of an employer's enterprise may be violative of Section 8(a)(3) if "* * * motivated by a purpose to chill unionism in any of the remaining plants of the single employer and the employer may reasonably have foreseen that such closing would likely have that effect." 380 U. S. 263, at 275. Since the Board had made no express findings on these issues of "purpose" and "effect", the Court vacated the judgment of the Court of Appeals, with instructions that the case be remanded to the Board for findings on these matters.

Thereafter, the General Counsel moved the Board to reopen the proceeding for the purpose of supplementing the record with additional evidence bearing upon "purpose"

and "effect". Respondents filed memoranda of opposition to the motion and also requested that the General Counsel furnish a bill of particulars specifying the evidence he proposed to adduce. Pursuant to the Board's direction, the General Counsel submitted a bill of particulars. The Respondents thereafter filed supplementary responses, renewing their opposition to the motion.

On October 25, 1965, the Board granted the motion of the General Counsel, deeming it "appropriate that all parties be afforded an opportunity to supplement the record in the light of the vital requisites which the Supreme Court has now explicated for the first time as governing a case of this kind". Subsequently, hearings were held before Trial Examiner Lloyd Buchanan on various days between November 1965 and March 1966. On August 10, 1966, the Trial Examiner issued his Supplemental Decision, in which he found, on both the evidence taken at the most recent hearings and that received at earlier hearings and presently cited by the parties, that the General Counsel had not established by a preponderance of the evidence (1) that those persons exercising control over Darlington were moved to close the plant by the required illicit purpose of chilling unionism; (2) that it was realistically foreseeable to such persons that the closing would have that effect; or (3) that the closing did, in fact, have a chilling effect. In conformity with these conclusions, the Trial Examiner recommended that the 8(a)(3) allegation against the Respondents be dismissed.

The General Counsel has filed exceptions to the Trial Examiner's Supplemental Decision and a brief in support of the exceptions. The Union has filed exceptions. Respondent Deering Milliken, Inc., has filed a brief in support of

the supplemental Decision, an answering brief, and cross-exceptions. Respondent Darlington has filed an answering brief and cross-exceptions. While both Respondents have requested the opportunity for oral argument before the Board, we believe that the record, the exceptions, and the briefs adequately present the positions advanced by the Respondents and accordingly deny the request.

The Board has reviewed the rulings made by the Trial Examiner at the hearing and finds that no prejudicial error was committed. The rulings are hereby affirmed, except as otherwise modified below. The Board has considered the opinion of the Supreme Court, the Trial Examiner's most recent Supplemental Decision, his prior Decisions, the exceptions and briefs, and the entire record in this case. Our appraisal of the evidence leads us to find, in disagreement with the Trial Examiner, that the General Counsel has established that the closing of Darlington was "* * * intended to be and was a grim deterrent to the thousands of employees in the affiliated plants who might entertain similar notions of unionization",[2] and that the persons exercising control over Darlington reasonably foresaw that the closing would likely have the intended effect.

The plant operated by the Darlington Manufacturing Company was a carded-cotton textile mill located in Darlington, South Carolina. In 1956, it employed about 525 persons and accounted for one-third of the economy of this town of some 6,700 population. In March 1956, the Textile Workers Union of America began an organizational campaign at Darlington which resulted in a representation election, won by the Union, on September 6, 1956. The

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[2] *N. L. R. B.* v. *Deering Milliken & Company, Inc.*, 325 F. 2d at 691 (C. A. 4) (dissenting opinion).

preelection period was marked by many incidents of coercive conduct engaged in by Darlington's officials and supervisors, including a number of threats of plant closing in the event of a Union victory. After the election, some employees were told that their action in voting for the Union would result in their names being placed on a blacklist.

The majority of the stock of Darlington and of 16 other corporations operating 27 non-unionized textile mills in both the Southern and the New England States[3] was owned, through direct ownership of stock and ownership of other corporations, by members of the Milliken family, frequently characterized in these proceedings as "the lineal descendants of Seth Milliken." As described in the Trial Examiner's second Supplemental Decision, our original Decision, and Judge Bell's dissenting opinion in the Court of Appeals, the Milliken family not only possessed controlling interest in the manufacturing corporations which operated the 27 mills, but also actively and personally managed those interests. A majority of the board of directors of each corporation, save one, were Millikens. But the chief figure in the family hierarchy was Roger Milliken. By 1956, Milliken-dominated directorates had appointed Roger Milliken to the presidency of all the corporation but one, and he served as vice-president and director of that one. As president and member of the board of Deering Milliken & Co., Inc., which served as selling agent and factor of accounts receivable for all the mills and which also held a substantial amount of stock of Darlington and the other

[3]In the South, there were 20 mills located in South Carolina, 3 in Georgia, and 2 in North Carolina. The Georgia and North Carolina plants are near the border of South Carolina. The number of hourly-paid employees in these mills, as of the end of 1956, was more than 14,000.

corporations, as chief executive of almost all of the manufacturing corporations, and as the member of the family assigned to perform all of these functions, Roger Milliken was manifestly the appointed steward of the Milliken family interests and the Deering Milliken fortunes.

Roger Milliken resided in Spartanburg, South Carolina, about 115 miles from Darlington. During the organizing effort, he had been kept abreast of the Union's progress by James Oeland, the mill treasurer (resident chief executive) of Darlington, through the medium of the weekly business report furnished him by Oeland. A few days after the September 6 election, Milliken called a special meeting of the board of directors for September 12 to consider the liquidation of Darlington. The board, four of whose members belonged to the Milliken family, met for 75 minutes, during which time they elected a new director, adopted a resolution to amend Darlington's pension plan in certain respects, and voted to recommend liquidation of the mill. According to the testimony in this case, the financial condition of Darlington was discussed at the board meeting. It was brought out that Darlington had averaged less than a 3 percent return on invested capital in the previous 5 years,[4] including the current year in which a loss of $40,000

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[4]In 1952, 1½ percent; in 1953, 8 percent; in 1954, slightly less than 2 percent; in 1955, about 3 percent; and in 1956, a projected *loss* of 1 percent. The expected loss for the current year had been reported to Roger Milliken by mill treasurer Oeland in August. Milliken at that time took no steps to liquidate the mill or to halt the substantial capital improvement program which had been initiated in 1956 and which had, in the first 9 months of that year, involved a capital expenditure of $400,000. See *infra*.

We note that the computation of yearly earning percentages by Milliken was based on "invested capital" of about $3,500,000; despite these calculations, Darlington paid an average dividend to stockholders of 5 percent over the years 1952-1955, based on a stock market value of $14 per share.

was expected, and that, if market prices did not rise or costs decrease, a loss of $240,000 could be anticipated in the following year. According to the testimony of Roger Milliken, although these facts had been known prior to September 6, the election of the Union was considered to be an adverse factor of sufficient importance to warrant bringing the matter of the dissolution of Darlington to the board for consideration. The board was so informed at the meeting, with unspecific references to the impact on the Darlington financial picture which could be expected from the "promises" made to the employees by the Union. No member of the board appears to have inquired as to the nature of these promises.

After the 30-day public notice required by South Carolina law, the stockholders met on October 17, 1956. A discussion of the situation, similar to that at the board meeting, ensued, with some stockholders strongly protesting the proposed action, in view of the consequences to the town of Darlington. As we found in our earlier Decision, at this meeting Roger Milliken expressly stated that he had decided to close the mill when the employees voted for the Union. 139 NLRB at 246. With Roger Milliken voting 72 percent of the stock, some personally held and the majority as proxy-holder, the stockholders accepted the recommendation to liquidate, and they further authorized an auction to be held on December 12 and 13, 1956. At the auction, the assets of Darlington were sold piecemeal to several purchasers.

In our first decision in this case, we found that the Union's election victory prompted the precipitate closing of Darlington. In agreement with the Trial Examiner, we concluded that the decision to shut the plant would not have been made but for the protected organizational activities

of the employees. 139 NLRB at 246. Whatever the normal economic problems facing Darlington in 1956, it was beyond dispute that no serious consideration had been given to closing the mill until the Union was selected as the bargaining representative of the employees. To the contrary, in 1955 a textile engineering firm had been hired to provide a long-range survey of improvements necessary to the profitability of Darlington's future operations. By September 1956, $400,000 had been spent in the improvement program which had been adopted, and construction changes were being undertaken to accommodate newly purchased looms. Just one month before the board of directors met to recommend dissolution, mill treasurer Oeland had reported to Milliken that he expected the mill to lose $40,000 for the year. At that time, Milliken did not call an emergency meeting of the board of directors or suggest that the plant renovation be suspended. The manufacturing operation and the capital improvement program continued routinely and uninterrupted until the employees voted for the Union. Within a matter of days thereafter, the board of directors, at Milliken's behest, had recommended liquidation, and 5 weeks later, with Milliken casting the determinative vote, the stockholders had agreed to dissolve the corporation. Milliken told the other stockholders that he had decided to close the mill when the Union was voted in, and immediately after the stockholders' meeting, he told a State senator that he would not run the mill, despite the existence of a disavowal petition which in the interim had been signed by 83 percent of the employees, as long as 17 percent of the work force remained loyal to the Union.

On such evidence, we found that the election of the Union caused the closing of Darlington. At that time, we understood the law to be that when an employer takes dis-

criminatory action against his employees because of their selection of a union as their bargaining agent, he violates the Act. Accordingly, having found that the election of the Union was a substantial cause of the plant's closing, a fact virtually conceded by Respondents, we held the closing unlawful under Section 8(a)(3). As we viewed the law, it seemed sufficient simply to determine whether the advent of the Union played a direct part in the decision to close Darlington. Finding this to be so—that Darlington would not have been abandoned but for the employees' selection of a union as their bargaining agent—we concluded that the law had been violated. Our approach did not necessitate, and we therefore did not undertake, an exploration of the question of precisely what employer antiunion purposes the closing was intended to serve. The Supreme Court has now made it clear that, subject to the exception hereafter noted, an employer may, without violating Section 8(a)(3), permanently terminate or diminish his enterprise, even if the action is a response to the election or existence of a union. But the Court has made it equally plain that, if one of the purposes behind the closing of a portion of a business is the deterrence of unionism in the remainder of the business, the partial closing is an unlawful exercise of the employer's economic power. Our failure to make findings as to the existence of such a purpose, and also as to the foreseeable likelihood that the purpose would be effectuated, has resulted in this remand. Accordingly, we are charged now with supplementing our earlier findings by a more searching inquiry into the nature of the considerations which led to the closing of Darlington.

Supplemental Decision

The Supreme Court stated that the following elements are necessary to a finding of an unfair labor practice in "a case of this kind" (380 U. S. at 275-6):

> "If the persons exercising control over a plant that is being closed for antiunion reasons (1) have an interest in another business, whether or not affiliated with or engaged in the same line of commercial activity as the closed plant, of sufficient substantiality to give promise of their reaping a benefit from the discouragement of unionization in that business; (2) act to close the plant with the purpose of producing such a result; and (3) occupy a relationship to the other business which makes it realistically foreseeable that its employees will fear that such business will also be closed down if they persist in organizational activities, we think that an unfair labor practice has been made out."

I.

As to the factors of "interest" and "relationship", said the Court, the Board's "* * * single employer finding necessarily embraced findings as to Roger Milliken and the Milliken family which, if sustained by the Court of Appeals, would satisfy * * *" these elements. *Id.* at 276. The Court's conclusion, we believe, obviates the need for any extended discussion of this issue. We have previously found that those in control of Darlington also effectively controlled many other proximate textile plants. Seventeen related corporations owned and operated 27 manufacturing plants including Darlington. These corporations and plants were owned by the Milliken family, through their majority ownership, directly and indirectly, of Deer-

ing Milliken & Co., Inc. and Cotwool Manufacturing Corp. (later merged together into Deering Milliken, Inc.) and through their individual ownership of shares in the manufacturing corporations. By virtue of its stock ownership, the Milliken family owned and controlled from 55 to 88 percent of the stock in each of the affiliated mill corporations. In our earlier Decision, we described at length the manner in which the Milliken family bound these corporate units into a closely integrated enterprise, all being commonly serviced by central research, taxation, insurance, purchasing, and selling offices. We noted the direct control over operational policy retained and exercised by the Milliken family, as shown by the facts that Roger Milliken served as president of all the mill corporations but one, and that a majority of the directors of all except one of these corporations were members of the Milliken family. After reviewing the evidence relating both to the existence of the power of control and to the actual exercise of that power, especially in the "crucial area" of labor relations (139 NLRB at 256), we concluded that the Deering Milliken group of corporations constituted a single enterprise, responsible for remedying the unfair labor practices then found.

As the Supreme Court has now pointed out, subsumed in our "single employer" finding were findings that the "persons exercising control over" Darlington (*i.e.*, the Milliken family, as advised and influenced by Roger Milliken) had interests in other business "of sufficient substantiality to give promise of their reaping a benefit from the discouragement of unionization" in those businesses. It could not reasonably be questioned that the Milliken family interests in the other textile mills—majority ownership of

them all—was sufficiently substantial, as the Court uses that term. This part of the Court's test asks whether the persons controlling Darlington were in a position to derive a substantial gain from the frustration of unionism in other businesses. The record abounds with evidence that they were.

II.

The record further shows that Roger Milliken, who voted a majority of the stock of Darlington in favor of liquidating the plant, was not only in a position to gain from discouraging union organization throughout his tightly-knit enterprises, but also believed that such discouragement was vital to the continued profitability of his operations. At the latest hearing, Milliken recounted a history of his unhappy experience with unions at plants with which he had been affiliated prior to 1956. A union strike over company-proposed work assignments had preceded the closing of the Deering Milliken mill in Madison, Maine, in 1947. At about the same time, 5 months after the termination of an 8-month union strike at the Dallas Manufacturing Company, in Huntsville, Alabama, the directors had voted to liquidate that concern. When the unionized employees of the Lockwood Mill, in Waterville, Maine, protesting an 8½-cent an hour wage cut, had struck in 1955, the Millikens decided to close down after the strike had continued for 7 weeks. As the evidence showed, these contacts with unions had left an impression on Roger Milliken. Before the Trial Examiner, Milliken expressed the opinion that unions are a "detrimental economic factor", "an economic factor which mean[s] increased resistance to cost-cutting". Nine years earlier, at the time of the Darlington closing, Milliken had conveyed this same view to J. M. Oeland, the mill

treasurer of Darlington, when he told Oeland that he was going to recommend to the board of directors that Darlington be liquidated. According to Oeland's testimony in the recent hearings, when Oeland asked that Milliken reconsider his decision, Milliken replied that "* * * he had tried operating a mill with a union, and, in every case, it had been a drain on the stockholders' money, and that he did not think it was wise to try to operate Darlington for that reason". It seems clear that, to Milliken, unions spelled obstruction and, eventually, destruction, and that it was pointless to operate a plant burdened with an entity which could only be a "drain on the stockholders' money".

But the evidence further indicates that Roger Milliken had been actively preoccupied with the dangers of unionism months before the first union organizer appeared at Darlington. Milliken's public statements, even prior to the Union campaign at Darlington, made manifest his intense concern in the mid-1950's with what he regarded as the threat to the Southern industrial community posed by anticipated union organizational drive. In October 1955 Milliken addressed the South Carolina Fiscal Survey Commission in the State House of South Carolina. Among those in attendance were the members of the South Carolina Congressional delegation, the Lieutenant Governor of South Carolina, and persons associated with the textile industry. Milliken's presentation was entitled "Teamwork: The South's Secret Weapon". While he touched on other problems facing Southern textile manufacturers, such as taxation and Japanese imports, his speech primarily focused on the urgent necessity to keep employees nonunionized (referred to as "teamwork" between management and labor). After expressing his belief that the textile industry in the South,

and South Carolina in particular, owed its survival to the quality of Southern labor and management personnel, Milliken went on to stress the need to achieve the lowest possible cost of production. But this objective, he continued, would not be realized unless South Carolina textile workers offered a full day's work for a full day's pay. The South Carolina employee had done and was doing this at the time. But, said Milliken, this employee attitude should be contrasted with the situation in Great Britain "* * * where the trades unions have insisted that no weaver can run more than four looms whether they be hand looms or automatic looms". And, similarly, the "* * * same intelligent attitude cannot be said to be held by the New England workers who have been influenced and badgered by CIO propaganda to resist all management changes and to throw road blocks in the way of making improvements that will lower costs." Milliken related that he knew from "bitter experience" that this difference in attitude can have disasterous consequences. He described the recent auction of the Lockwood mill and the prior liquidation of the Madison plant, where "* * * we had purchased one-quarter of a million dollars' worth of new looms but were told by the unions when they arrived that the weavers could not handle any more of the new looms than they had of the old, regardless of the fact that the amount of work was more than halved. The result is that today our woolen operation in South Carolina is more than double what it was, and the Madison Mill is empty of textile machinery." In summarizing his remarks on this topic, Milliken stressed that the "* * * importance of the worker's attitude cannot be too heavily underscored in our thinking". The proper attitude was absent in "* * *a mill that we operated in Huntsville, Alabama, with the result that we were unwilling to invest in new machinery and the

mill was liquidated in 1947". The fact that the Lincoln Mill (not a Deering Milliken affiliate), also in Huntsville, was in the process of closing down showed that "* * * we are not alone in our thinking". Cooperation between management and labor "* * * is South Carolina's greatest asset and one that should be cherished and nourished *at all costs*." [Emphasis supplied.] Finally, Milliken closed his discussion of the subject by noting that lower wages being paid in neighboring States rendered "* * * our fight for survival" even more difficult, making it necessary for "* * * all of us working together to strive continually for lower costs."[5]

Three months later, in January 1956, Milliken again disclosed his abiding concern with the specter of unionism. In an address to the Kiwanis Club of Spartanburg on the hopes for industrial development in Spartanburg County, where several Deering Milliken mills were located, Milliken declared that the labor problem was the "primary" factor in the situation. He referred to the reported announcement of a Wisconsin union leader that he would be in South Carolina to "greet" a Wisconsin nontextile firm which had recently decided to build in Spartanburg, and he asked the Kiwanians, "* * * the question is, how are we going to greet these greeters?" He attributed the decision of two other firms not to locate in the county to the "risky" character of the labor situation (there being five organized plants at the time). He stated that "union

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[5]The Trial Examiner refused to admit evidence of this speech, on the ground that it was too vague to provide a basis for inferring unlawful purpose. We believe that the meaning of the speech is plain, and that the speech is clearly relevant to the question of Milliken's fear of unions as a threat to the entire Southern textile industry. We reverse his ruling and admit General Counsel's Exhibit BB into evidence.

feather-bedding practices" had in the past led to Deering Milliken decisions to liquidate three textile plants—two in Maine and one in Alabama. His speech concluded:

> Let's fight together to keep this foreign philosophy out of our town. Let's work together to the end that Spartanburg and South Carolina can grow together and *demonstrate to the rest of the country* the advantages of teamwork between workers and management. That is our secret weapon. (Emphasis supplied.)

We think these speeches shed considerable light on Roger Milliken's reaction to the news that the Union had won at Darlington. They indicate that, within months before the Darlington election, he was engrossed, enough to speak out twice publicly, with the need to prepare for the Union's organizational drive in the South. To Milliken, the textile industry was engaged in an economic "fight for survival"; the labor situation was the "primary" factor of concern; unions meant the end of "teamwork"; no teamwork meant empty mills, as the New England experience had proved; and common defense against the foe was required: "the question is, how are we going to greet these greeters?" Against this background, it becomes clear, we believe, that to Roger Milliken the Union victory at Darlington had substantial implications for the 26 other mills in the Deering Milliken complex. To an employer who had been alerting an entire area to the dangers of unionization, the Union victory at Darlington, the first breach by a union since World War II of the Deering Milliken defenses in South Carolina, was understandably a portent of other union victories in other plants, if permitted to go unchallenged. We have seen that Roger Milliken's view of the industrial situation

reached far beyond the localized impact of a single union victory at a single plant. This outlook, coupled with his repeated and unqualified statements about the perils offered by unionism, indicates to us, and we find, that Milliken's actions with respect to the union problem at Darlington were responsive at least as much to the supposed needs of the 26 other mills as they were to the needs of Darlington.

Respondents argue that Section 8(c) of the Act[6] forbids the use of these speeches as evidence that Milliken was guilty of the unfair labor practice charged. The legislative history of that provision indicates that the provision was intended to prohibit the finding of an unfair labor practice *simply* on the basis of an employer's expressed opposition to unions, containing neither threat of reprisal nor promise of benefit.[7] The legislative background also makes clear, however, that this section left unrestricted the Board's right to consider employer statements for purposes for which they would be ordinarily admissible in courts of

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[6] "The expressing of any views, argument, or opinion, or the dissemination thereof, whether in written, printed, graphic, or visual form, shall not constitute or be evidence of an unfair labor practice under any of the provisions of this Act, if such expression contains no threat of reprisal or force or promise of benefit."

[7] See especially the supplementary analysis submitted by Senator Taft at 2 Legis. Hist. 1624: "The conferees had in mind a number of Board decisions in which because of the fact that an employer has at some time committed an unfair labor practice a speech by him, innocuous in itself, has been held not to be privileged * * * There have also been a number of decisions by the Board in which discharges of employees, even though there was no evidence in the surrounding circumstances of discrimination, have been deemed unfair-labor practices simply because at one time or another the employer has expressed himself as not in favor of unionization of his employees. The object of this section [8(c)], therefore, is to make it clear that decisions of this sort cannot be made under the conference bill."

law.[8] Whatever limitations Section 8(c) might impose in other circumstances upon the use of employer expressions of antiunion sentiment, the purpose for which we here consider these speeches does not violate that provision. In this case, we look to Milliken's speeches not simply as proof that he closed Darlington because of the Union (a settled matter, we believe), but as evidence of both his apprehension of an anticipated large-scale union campaign and of his belief that an industrywide response was imperative. These two speeches clarify the scope and breadth of the antiunion considerations which led to the Darlington closing, and we think that Section 8(c) was not intended to interdict evidence offered for this purpose.

The direct relationship between the closing of Darlington and Milliken's serious concern with the union threat to all of his textile mills is revealed by a message which he transmitted to all mill treasurers on November 14, 1956, one month after the stockholders of Darlington voted to liquidate and one month before the mill was auctioned. The distribution consisted of reprints of an article and an edi-

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[8]Senator Taft's memorandum of legislative intent of June 5, 1947, stated: "It shall be noted that this subsection is limited to 'views, arguments, or opinions' and does not cover instructions, directions, or other statements which might be deemed admissions under ordinary rules of evidence. In other words, this section does not make incompetent, evidence which would ordinarily be deemed relevant and admissible in courts of law." 2 Legis. Hist. 1541. See also 2 Legis. Hist. 1624. And see *N. L. R. B.* v. *Lipman Brothers, Inc.*, 355 F. 2d 15 (C.A. 1); *N. L. R. B.* v. *Baker Hotel of Dallas, Inc.*, 311 F. 2d 528 (C.A. 5); *N. L. R. B.* v. *Southern Desk Co.*, 246 F. 2d 53 (C.A. 4); *Angwell Curtain Co.* v. *N. L. R. B.*, 192 F. 2d 899 (C.A. 7), for the proposition that employer statements of opposition to unions may, at least in certain circumstances, be considered in determining whether the employer action in question was unlawfully motivated.

torial which had appeared in the November 8th edition of *America's Textile Reporter,* a trade magazine; a copy of a news article concerning labor turmoil at a Massachusetts factory, excerpted from the South Carolina State Chamber of Commerce newsletter of October 1956; and a covering memorandum by Milliken. The first-mentioned article, headlined "Darlington Situation Becomes Object Lesson to All Concerned" and subheaded "Present Stepped-Up Union Activity in South Harbinger of Stronger Efforts and More Exaggerated Promises To Come", purported to be an in-depth study of why 500 mill workers "suddenly elect[ed] to put their future in the hands of" the TWUA. The article first describes at some length the Union's successful campaign at Darlington, the "deceptive" promises to the employees, and the effect of the closing on the town's economy. The article then, in discussing the "lesson to be learned" from Darlington, stresses: (1) The extent to which unions will go in order to deceive employees; (2) the importance of communication between management and labor, for the purpose of making labor aware of its role as part of the team; and (3) the necessity for affirmative efforts at public relations by large firms, on both a local and national level.

Appearing in the magazine in conjunction with the article, and reprinted and circulated by Milliken, was an editorial. In part, the editorial expressed the belief that the liquidation of Darlington was a foregone conclusion from the moment that the votes were counted in the representation election; it cited as the basis for this opinion the earlier closing of the Dallas and Madison mills which, according to

the editorial, had been liquidated as soon as they were unionized.[9]

The separately printed excerpt from the Chamber of Commerce newsletter told of a Massachusetts bedspread factory which had decided to close down in November. Since signing a bargaining agreement in February, "* * * the union had kept the mill in a state of turmoil and reduced efficiency * * *", and the owners had decided to terminate the operation.

Milliken's memorandum attached to this reprinted material shows that, in his view, although the Darlington question may have been resolved, the greater issue that Darlington represented was very much alive. He wrote, in part:

> "It is apparent from this [*America's Textile Reporter*] article that this magazine made a real investigation in Darlington, and for that reason, I think the article is interesting. While this article shows that the union leaders definitely misled the people, it also points out that the mill was negligent in its public relations. I hope that you will read this second part of the article carefully and review in your mind the steps that you are taking to bring about an understanding of your mill and its problems in your community. *The unions are going to be making a tremendous drive all through this area,* and there are few things that are more important to us than making sure that the leaders in your

[9] Milliken's testimony at the hearing, however, revealed that neither mill had been liquidated *upon* unionization, but only after unions had represented the employees for some length of time. His memorandum covering the editorial made no effort to correct the erroneous impression left by its author.

community understand and are sympathetic to what you are trying to do." (Emphasis supplied)

We think the memorandum and its attachments are important on two counts. First, they demonstrate both Milliken's firm opinion that the unions were in the process of mounting a "tremendous" campaign throughout the Southern area, and his grave concern about that campaign. Secondly, by delivering the message on the need for good "public relations" through the medium of a dramatic article about the Darlington plant closing and the other enclosures, the results of a failure of "public relations" were made pointedly clear. The gratuitous inclusion of the editorial describing the Milliken "tradition" of closing a plant whenever a union appeared, as well as the article about the Massachusetts factory, shows that the closing of Darlington was to be made a symbol throughout the Deering Milliken chain of what unionism would mean. In a message so freighted with references to plant closings (of Darlington; of the Madison and Dallas plants; of the Massachusetts factory), it is apparent that what the mill heads were being instructed to make "the leaders in your community understand" was that the mill might no longer be in that community, if the employees chose to unionize. Milliken himself testified that, in sending the articles, he wanted the mill treasurers to make "* * * sure that the people in the community, the leaders, realized the competitive nature of the textile business and the necessity in order to survive of lowering costs * * *." The only way that community leaders could make use of this information would be by impressing upon employees the risks of unionism; an emphatic and timely example of those risks was Darlington. Although Milliken did not expressly announce that Darlington had been closed in an effort to

allay the spread of unionism, he did not have to.[10] Clearly implicit in the enclosed material about plant closing was a simple message, to be transmitted from the mill officials to the community leaders and, from both groups, to the employees: If your local mill goes union, it will, like Darlington, be closed down.

Together with these direct communications of Roger Milliken's intention to thwart unionism wherever it appeared, which were issued both before and after the election at Darlington, other circumstances attending the Darlington closing confirm that it was undertaken with an eye to the impact that it would have on employees at other mills.

The haste with which the disposition of the mill was accomplished indicated a desire to expunge any doubt from the minds of other employees that the Union was directly responsible for the unemployment of the Darlington workers. The board of directors met only 6 days after the election, although it had been customary to issue several weeks' notice of such a meeting. The stockholders met 35 days later, almost as soon as legally permissible after publication of the 30-day notice required by law. Less than 2 months after this meeting, the auction was held. The liquidation could hardly have been accomplished with more dispatch, and its timing could only definitely establish the relationship between the election and the auction in the minds of those following the events.

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[10]The Union had filed charges with the Board in October 1956, even before the plant closed, alleging that the decision to liquidate Darlington was in violation of Section 8(a)(3). That Milliken was exercising extreme caution in his references to the Darlington situation during this period is indicated by a letter he wrote to a friend on November 3, 1956, in which he noted that he had "* * * tried to avoid getting into a discussion in the newspapers with the union or with [State Senator] Mozingo * * *."

Supplemental Decision

Roger Milliken has testified, in essence, that the appearance of the Union meant increased "resistance to cost-cutting" and "lack of cooperation" which, together with the unpromising financial condition of Darlington, led him to conclude that the operation of the plant should be discontinued. This determination of the Union's effect on profitability was made before the Union presented any demands or proposals to Darlington, and, on this judgment alone, Milliken testified, he set into motion the legal machinery which would eventually close the plant. But, after the directors voted to recommend liquidation, 83 percent of the employees signed a petition disavowing the Union. When State Senator Mozingo implored Milliken, immediately after the stockholders' meeting, to reconsider his decision to liquidate, mentioning the petition as an indication of the employees' repentance, Milliken replied, "As long as there are seventeen percent of the hard core crowd here, I refuse to run the mill."

We note that Milliken had not refused to run the mill previously, despite the existence of a known minority, "perhaps 25%", of employees who over the years had resisted carrying out work assignment changes, and who, Oeland had "constantly" told Milliken, represented "a very conscious [*sic*] impediment" to attaining the best results. But in prior years the employees had not voted for a union, and in 1956 they had. As the General Counsel asks: Could Roger Milliken have seriously feared much "resistance to cost-cutting" from a union which the employees had all but abandoned? At the hearing, Milliken acknowledged that he had been aware that the Union might be decertified as the bargaining representative after one year. He further admitted awareness of a situation in his own experience where the parties had lawfully bargained for more than two years

without reaching a contract. In these circumstances, we conclude that his utter determination to close could hardly have been based on any real fears of resistance engendered by the 17 percent "hard core". And if his resolve to close Darlington was not founded on a sincere belief that the Union any longer represented an impediment to cost-cutting, what reasons could have brought about this fixed attitude? As little as a month before the election, Milliken was notified of a projected loss of $40,000 for the year, and he took no step toward considering liquidation or halting the implementation of the substantial improvement program then in progress at Darlington. There is no indication that Darlington's earning potential, or the possibility of other uses of the capital already invested in the plant, suddenly developed an importance that these factors did not have a month before. Clearly, it was the election of the Union that accounted for Milliken's decision that Darlington must be closed. But if Milliken had no real cause to be concerned about the Union's threat to the plant's productivity, and if he was not suddenly dissatisfied with the idea of continuing as an investment the capital then in, and being added to, Darlington, as seems clear from his unperturbed attitude of a month before the election, then why was Milliken so committed to the idea of closing the Darlington plant, at the considerable cost of antagonizing State and local community leaders? We think it fair to infer that he saw the opportunity to convey to all his employees an object lesson of the folly of selecting the Union. The first Deering Milliken mill in South Carolina to be organized in a dozen years presented a chance to create a graphic example of the hazards of unionism, especially since, as Respondents themselves contend, the mill was not an exceptionally profitable one and, accordingly, dispensable. We are convinced that

Milliken recognized that chance and seized it. No other purpose explains the absoluteness of his determination to close, or, for that matter, its speed, which was swifter than the arrival of the Union's first proposal.

In sum, Roger Milliken was, in 1956, a man of strong views about unionism, derived from a series of disquieting relationships with unions earlier in his career. His convictions about the dangers of unionism to South Carolina textile interests, and, of course, to his own, carried with them a sufficient sense of urgency to lead him publicly to urge South Carolina officials and businessmen to prepare for averting unionism "at all costs", a call to action uttered months before the Union initiated its Darlington campaign. When that campaign culminated in a victory for the Union, unprecedented at a South Carolina Deering Milliken mill in more than a decade, Roger Milliken moved quickly to empty the plant. With a resoluteness which, in view of the desertion of the Union by most of the employees, could only be explained by an intention to set a memorable example, he saw to it that, within 14 weeks after the election, buyers were hauling the Darlington machinery away. To assure that the lesson (already the subject of "widespread" publicity of which he was aware) was not lost on his mill officials and their community leaders, and the employees whom they both could influence, he circulated to the mills a recommendation for a "public relations" program, the suggested content of which was readily apparent in the meaningful material attached to the memorandum. We think it clear from all this that, when Roger Milliken acted at Darlington, his concern transcended the fate of the Darlington mill alone, and en-

compassed as well the future of all the mills with which he was connected. We find that the closing of Darlington was, at least in part, the product of a desire to discourage unionism among employees at other Deering Milliken mills.

In finding that such a purpose existed, we have fully considered those items of evidence and inference which, the Respondents assert, make doubtful the existence of a purpose to chill unionism at other plants. Roger Milliken issued only three press releases during the closing period, none of which mentioned the Union, and one of which stressed economic factors as the reason for the closing. Respondents contend that his restraint in this regard is incompatible with a purpose to discourage unionism elsewhere. But the *fact* that the closing was being "widely commented upon" in the news media from the moment the board of directors acted, as Milliken testified, weakens the inference Respondents would have us draw from his failure to do more. It can as well be inferred that it was unnecessary for him to add fuel to a fire which the press and the Union itself were stoking so well. In a similar vein, it is argued that the implication in the record that Milliken made no effort to thwart any bidding for the plant as a going operation indicates that he was not interested in chilling, since a mill which merely changes hands when organized hardly has as chilling an effect as would an empty mill. But the chronology of bidding at the auction of Darlington (bulk bid first, piecemeal bids thereafter) left Milliken in a position of considerable control over the ultimate manner of sale. With the bulk bid known from the beginning; with the auction operating under the ground rule that the bulk bid would prevail only if it exceeded the total of the piecemeal sale; and with representatives of other Deering Milliken

plants present and bidding for separate equipment, Milliken seems to have been in a position of exercising considerable control over the method of disposition of the plant. We think it likely that taking the bulk bid last would increase the probability of obtaining a bulk bid higher than the aggregate of the piecemeal bids.[11]

We are aware of the testimony by the members of the board of directors and stockholders (including Roger Milliken) that they did not intend, by the votes they cast, to chill unionism elsewhere, and that such a prospect was not discussed at the two meetings. While the Trial Examiner did not expressly find this testimony credible, neither did he discredit it,[12] and it stands uncontradicted in the record. But we find it of little moment that there was such testimony from the other directors, for we believe that the critical purpose is the one which moved Roger Milliken. He held the obvious position of power in the corporate organization, he convened the meeting, he offered the resolution, and he advised why the resolution should be accepted. The other Millikens were only tangentially related to the manufac-

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[11]A week after the stockholders' meeting, an editorial in the Darlington *News and Press* carried a story stating that State Senator Mozingo had criticized Milliken's choice of bidding procedure on precisely this ground, and alleging that the Senator had consequently characterized as hypothetical Milliken's professed concern for lessening the adverse impact upon local residents. We consider this editorial not as evidence that the statements were in fact made, but only as evidence that, 6 weeks prior to the auction, the public prints contained a suggestion for what appears to be a more reasonable procedure.

[12]In his treatment of the testimony of "members of the Milliken family", the Examiner merely concluded, "The statements of purpose are negative, and whoever would regard them with skepticism cannot rely on them as proving the contrary. The testimony now received from the Darlington directors and stockholders supports the original finding that Darlington would not have been liquidated in 1956 but for the Union and its election victory." TXD, Section V.

turing operation. Gerrish Milliken, brother to Roger Milliken, was involved in the sales section of Deering Milliken, and had been elected to the Darlington board an hour before he voted to recommend liquidation of the plant; Minot Milliken, Roger Milliken's cousin, was the New York-based treasurer of Deering Milliken, whose prior experience had been in the woolen sales end of the operation; Harold Hatch, an uncle by marriage of Roger Milliken, had been a director of Darlington since 1908, but, in 1956, he was in semi-retirement in Connecticut. These three, plus Roger Milliken were the only votes necessary to carry the resolution. Having conferred with all three prior to the meeting, Roger Milliken scarcely needed to explain fully to the other three directors (Oeland, the mill treasurer of Darlington, Lyles, a South Carolina businessman, and Nicholson, a former mill treasurer of Darlington, then retired and having no interest in other Deering Milliken Mills) the effect the closing might have on other Deering Milliken employees.[13] That Milliken went into no such detail is not decisive of the question of whether the proscribed purpose existed. Oeland, Lyles, and Nicholson had no reason to be interested in the effect on employees elsewhere.

It is true that the Union was mentioned at the meeting as a precipitating factor leading to the meeting call; the Trial Examiner, in another context, considers it arguable that the "* * * very frankness of such a declaration of attitude * * * suggests that he [Milliken] would have been equally frank had he acted out of concern for other mills and with the purpose to affect employees at other mills or businesses". TXD, Section V. Sometimes the

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[13]According to Milliken, the three local directors were not even told prior to September 12 what the purpose of the meeting was to be.

glaring facts compel a certain amount of candor, but it does not follow from this that the whole truth will be laid bare. The Union victory was to obvious and operative a factor in the call for dissolution to allow it to go unmentioned.

It may also be noted that one of the legal positions taken by Respondents now, and throughout the course of this litigation, is that the disharmony and lack of cooperation which an employer might anticipate from a union are, under the Act, a valid economic basis for taking action affecting the job tenure of employees. Having previously discussed the union victory and its implications with Mr. James D. Poag, an experienced labor lawyer, who also attended the meeting of the board, Milliken undoubtedly recognized (1) the necessity for admitting the patent nexus between the election and the liquidation, (2) the probability that the Union would protest to this Board, and (3) the likelihood that his defense would include the argument that a union is just another economic condition which management may legitimately consider. With these prospects in the offing, it would have been pointless simply to omit any reference to the Union. But no attorney construing the Act at any time in its history would have deemed it prudent to mention further that the closing would have a desirable inhibitory effect on organization of employees at other mills. Accordingly, it seems to us that Milliken's reference to the Union was, in the circumstances, unavoidable, and not necessarily a courageous display of candor which certifies its own completeness. And, for these reasons, we do not consider the testimony that other mills were not mentioned at the board or stockholder meetings, or that the other directors testified that they harbored no intent to chill unionism elsewhere, to be of special value. Roger Milliken's denial of illicit purpose is the one which

must survive the weight of the other evidence, and we find that it does not.

In concluding that such a purpose to chill existed, we have relied upon what we consider to be fair inferences arising from the totality of the evidence, considered in the light of then-existing circumstances. Respondents argue that the Supreme Court is requiring "* * * concrete, specific, independent proof * * *" [14] of a purpose to chill unionism. Insofar as this formulation is intended to be a restatement of the Court's standard that there must be "* * * a showing of motivation which is aimed at achieving the prohibited effect",[15] we concur. But the requisite motivation may be proved by something less than direct evidence, rarely available in cases of this kind.[16] In this branch of the law, as in all others, proof of motive may be supplied by circumstantial evidence which affords a sound basis for drawing inferences. The rationality of the inferences we draw in this case is perhaps even clearer than in ordinary Section 8(a)(3) cases, for here it has been found and virtually conceded that Darlington was closed because of opposition to the Union. Where one such directly causative antiunion motive is posited, the probability of a second antiunion purpose, of wider gauge, becomes stronger. We do not mean to say by this that proof of one such motive *ipso facto*

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[14]Brief for Respondent Deering Milliken, Inc., p. 7.

[15]*Textile Workers* v. *Darlington Manufacturing Co.*, 380 U. S. at 276.

[16]"Actual motive, a state of mind, being the question, it is seldom that direct evidence will be available that is not also self-serving. In such cases, the self-serving declaration is not conclusive; the trier of fact may infer motive from the total circumstances proved. Otherwise, no person accused of unlawful motive who took the stand and testified to a lawful motive could be brought to book." *Shattuck Denn Mining Corporation* v. *N. L. R. B.*, 362 F. 2d 466, 470 (C. A. 9).

proves another. We simply suggest that the existence of one motive may indicate a disposition toward another.

The strength of the inferences to be drawn depends, of course, upon all the facts and circumstances of the case. Thus, for example, if an employer with one plant in Maine and another in Florida were permanently to shut down the Maine plant when it became unionized because of a stated distaste for dealing with unions, and the evidence disclosed no intention to give closing notoriety in Florida, we would not be likely to draw from such bare facts the conclusion that a purpose to chill unionism in the Florida plant existed.[17] In other hypothetical situations, the fact that the employer had clearly decided to close because of the "* * * personal satisfaction that [he might] derive from standing on his beliefs, * * *",[18] or because of religious scruples against dealing with unions, could persuasively neutralize the weight of other factors, such as number and proximity of plants, which, with other substantial evidence, might tend to support a reasonable inference of a chilling purpose. But here, as we believe our prior discussion demonstrates, we are not deciding the case of an employer who closed down for reasons of personal ideology or convenience, nor are we deciding any other hypothetical situation not presently before us. The record in this case establishes that, to Roger Milliken, unions represented a "detrimental economic factor" which he would prefer not to have in Darlington and which could certainly spell disaster if they spread throughout his mills. When an employer with such a belief, controlling 20 mills in South Carolina, 3 in Georgia, and 2 in North Carolina,

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[17]Cf. *A. C. Rochat Company*, 163 NLRB No. 49.

[18]380 U. S. at 272.

decides abruptly to close one of these mills (which he had not otherwise thought of closing) when it becomes unionized, the purpose to chill unionism elsewhere becomes more readily inferrable from the other evidence of discriminatory intent present in this case.

In discussing, in its *Darlington* opinion, earlier cases involving partial closings, the Supreme Court has indicated that valid inferences of a purpose to chill unionism may be drawn from appropriate facts. This discussion is especially valuable insofar as it establishes the importance to be attached to an employer's anticipation of a union campaign directed at his entire operation, as an indicium of his chilling purpose in closing part of the operation. At footnote 19, 380 U. S. 273, the Court reviews and approves *N. L. R. B.* v. *Savoy Laundry,* 137 NLRB 306, 327 F. 2d 370 (C. A. 2), and *N. L. R. B.* v. *Missouri Transit Co.,* 116 NLRB 587, 250 F. 2d 261 (C. A. 8), as partial closings "* * * found to have been motivated, at least in part,[19] by the expectation of achieving future benefits". In both cases, the Court summarized, the Union was trying to organize all of the employees throughout each operation, and in both cases, the Court concluded, the partial closing was intended to discourage unionism in the overall enterprise. The existence

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[19]We note here the separate contention by Respondents that the closing is only an unfair labor practice if the intention to chill was the "primary" or "predominant" motive. Brief for Respondent Darlington, pp. A-7-10. The Court's acceptance of *Savoy* and *Missouri Transit,* which found unfair practices on the basis of motivations "at least in part" directed toward securing future benefits, seems clearly to refute this contention, as do other specific portions of the Court's opinion ("if motivated by a purpose", 380 U. S. at 275; "If the persons exercising control over a plant *that is being closed for antiunion reasons* * * * act to close their plant with the purpose of [chilling]", 380 U. S. at 275 [emphasis supplied]) and, as well, the whole context of the decision.

of this purpose was perhaps clearer in the *Savoy* case, where there were no separate departments, and the discharge of a group of employees, performing the same work as the retained employees, all of whom the Union was seeking to represent, was "obviously to discourage unionization in the entire plant". In *Missouri Transit,* however, there *were* separate departments—a shuttle bus service and a long-line service. The Employer closed down only the shuttle service. In analyzing the facts of this case, the Supreme Court concluded, "Although the two services were treated as separate departments, it is clear from the facts of the case that the union was attempting to organize all of the drivers, and the discriminatory motive of the employer was to discourage unionization in the interstate service as well as the shuttle service". As we read the facts of the *Missouri Transit* case, there is no more specific evidence of an employer purpose to chill than the inference arising from his awareness that the union was attempting, as the Supreme Court reads the case, to organize the entire employee complement. If employer knowledge of actual union activity aimed at other employees can provide a legitimate foundation for inferring an intention to chill those employees, it would seem that the inference would be no less warranted where the evidence establishes a strong employer belief that the union is intending imminently to organize the employees in his other operations. Since our central concern is with the employer's motive, the *fact* of impending organization is not significant; his *belief* in the existence of that fact is what matters. And, as we have seen, in this case, both before and after the election, Roger Milliken had no reservations about his expectation of what was coming: "The unions are going to be making a tremendous drive all through this area. * * *" Again, in future cases, distinc-

tions in the timing of the Union's campaign; in the strength of the employer's fear of, and his anticipation of, that campaign; in the number of plants and their proximity; and related factors, might well be the kinds of distinctions that lead to a difference in result. But we see no really substantial distinction between the significant factors in this case and those the Supreme Court considered to be of importance in *Missouri Transit*.

We make our finding of purpose here with full awareness of, and complete respect for, the Court's caveat that "[i]t does not suffice to establish the unfair labor practice charged here to argue that the Darlington closing necessarily had an adverse impact upon unionization in other plants". 380 U. S. at 276. Our inquiry into purpose has extended far beyond the lone fact that an adverse impact elsewhere was foreseeable. As directed, we have examined the record to determine whether or not it fairly supports the conclusion that, by closing Darlington, Milliken intended to bring about that impact. In pursuance of the delicate duty of discriminating between, or "sifting",[20] separate antiunion motives, we have attempted to ascertain, as precisely as possible, the motivation of Roger Milliken, as revealed by his conduct preceding the election at Darlington, the manner and the circumstances of his behavior in making and implementing the decision to close, the significant use to which he later put the closing, and the inferences derivable therefrom. This, we believe, is far removed from simply equating foreseeable consequences with prior motivation. As earlier discussed, any number of varying circumstances in other situations might well be persuasive that, while the foreseeability of adverse effect elsewhere

[20]Getman, "Section 8(a)(3) of the NLRA and the Effort to Insulate Employee Free Choice", 32 *U. Chi. L. Rev.* 735, 756.

was as much present as here, the proscribed intention to chill was not. In the instant case, the evidence relevant to the motives of *this* employer leads us to conclude that among his purposes in closing Darlington was that of discouraging unionism in other plants.

III.

The third matter to be considered under the remand relates to the chilling "effect" of the partial closing. The Court describes this element in various ways:

> [I]f the employer *may reasonably have foreseen that* [the closing motivated by a purpose to chill] *would likely have that effect.* 380 U. S. at 275 [Emphasis supplied.]
>
> If the persons exercising control . . . *occupy a relationship to the other business which makes it realistically foreseeable that its employees will fear that such business will also be closed down* if they persist in organizational activities. * * * 380 U. S. at 275-6 [Emphasis supplied.]
>
> Thus, the Board's findings as to the purpose and *foreseeable effect* of the Darlington closing pertained *only* to its impact on the Darlington employees. 380 U. S. at 276 [Initial emphasis supplied.]

It might be forcefully argued, although it has not been, that, in another portion of its opinion, the Court has already settled the question of "effect", leaving only the formality of a finding to be made by this Board.[21] The

[21]The parties offer differing constructions of what the Court means by "effect". General Counsel argues that, once a chilling purpose is found, the answer to the question of whether the employer

(Footnote continued on following page)

third element of the detailed statement by the Court of the constituents of an unfair labor practice in this case reads (as just noted but with different emphasis):

> If the persons exercising control over a closed plant (3) occupy a *relationship* to the other business *which makes it realistically foreseeable that its employees will fear* that such business will also be closed down if they persist in organizational activities. * * * 380 U. S. at 275-6 [Emphasis supplied.]

The element of "effect" is thus defined by reference to the *nature of the relationship* of the persons exercising control over the closed business to the remainder of the business—*i.e.*, is that relationship one "which makes it realistically foreseeable" that the other employees will fear closing. The Court then goes on to say that the Board's "single employer" finding "necessarily embraced" findings as to the Millikens which ". . . would satisfy the elements of 'interest' and 'relationship' with respect to other parts of the Deering Milliken enterprise. * * *" 380 U. S. at 276. If our prior single employer finding necessarily embraced a finding of "relationship", and if, as we have

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(Footnote continued from preceding page)

"may reasonably have foreseen that [the closing] would likely have" a chilling effect "flows almost by necessity" from the affirmative answer to the first question. Brief for General Counsel, p. 112. In other words, it would be only reasonable to concur in an employer's judgment that his action, intended to be chilling, would have the desired result. The Trial Examiner apparently would have rested on the tendency of the closing adversely to affect employees elsewhere, but, having received some evidence bearing on the actual effect on other employees, he felt that any inference he might otherwise have drawn was dispelled by the unpersuasive character of the evidence adduced. TXD, Section VI. The Respondents contend that there must be a showing of "actual effect" upon the employees. Answering brief for Respondent Deering Milliken, pp. 23-24.

discussed, a finding of the requisite "relationship" necessarily entails a finding of "effect", then it would seem that our inquiry as to effect is at an end. If we ask the question, what sort of "relationship" is it that we have necessarily found, the answer would seemingly have to be, by the Court's definition of terms, a "relationship to the other business which makes it realistically foreseeable that its employees will fear that such business will also be closed down if they persist in organizational activities".

We are mindful, however, that, after its consideration of what our single employer finding embraces, the Court then states ". . . [all of] the Board findings fall short of establishing the factors of 'purpose' and 'effect' which are vital requisites of the general principles that govern a case of this kind". In view of this language, we have undertaken an independent appraisal of the evidence.[22] Our study leads us to believe that a relationship of the sort outlined by the Court certainly existed, and that it was realistically foreseeable (1) that the news of the Darlington closing would be communicated to other Deering Milliken employees, (2) that these other employees would be aware of the connection between Darlington and their mills, and (3) that the cir-

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[22]To conclude that the Court has already decided the question of "effect" by finding "relationship" would not simply be a performance of verbal gymnastics. The Court might well have felt that the considerable evidence, then before it, showing the close affiliation of the 27 mills, was a sufficient basis for inferring that a chilling effect would be foreseeable to those exercising control over Darlington. The dissenting Court of Appeals judges apparently would have been willing to draw such an inference from the same evidence, although they did not discuss foreseeability: they found that the closing "* * * was intended to be, and was, a grim deterrent. * * *" *Darlington Mfg. Co.* v. *N.L.R.B.*, 325 F. 2d at 691 (dissenting opinion).

cumstances of the closing would cause these employees to fear a similar consequence from any union activity in which they might engage.[23]

As to (1), we need not go much further than the Deering Milliken-controlled Hartsville Mill, located some 14 miles from Darlington, and employing, in 1956, about 490 employees. There can be no question that the Hartsville employees would, foreseeably, be apprised of every detail of the events occurring at their sister mill. The Hartsville and Darlington mills were located in the same county, and the same local newspapers, which could be expected to, and did, give heavy coverage to the closing of Darlington, served both Darlington and Hartsville homes. That the message of the Darlington closing was conveyed to the employees at Hartsville and at other Deering Milliken mills, and, as could be anticipated, loomed prominently in their minds, is supported by the record. Employee Howard of Hartsville, for example, heard conversations among employees "concerning the Darlington closedown" during each year of the period from 1957 to 1961.[24] It was said in these conversations that if the Hartsville employees " * * *

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[23]Respondents argued to the Trial Examiner that it is not enough to establish that the remaining employees were likely deterred from future collective activity. They would read into the Court's wording "* * * employees will fear that such business will also be closed down if they *persist* in organizational activities * * *" [emphasis supplied] a requirement that such employees must have been actually involved in union activity at the time Darlington was closed. We do not think that the Court would intentionally indulge in such a fine distinction without making the reason for it very clear. Surely, a purpose to thwart impending organizational activity promises to reap as much benefit as that intended to frustrate a current organizing effort.

[24]The Trial Examiner had ruled early in the recent hearing that he would not accept evidence of events at other mills occurring subsequent to 1961, *i.e.*, more than 5 years after the closing of Darlington.

were organized that the mill would shut down." Dizbon, formerly an employee at the Drayton Mill in Spartanburg, South Carolina, heard about the closing when it happened, and heard other employees discussing it. Hogan, a former shift overseer at one of the Pacolet Mills, in Pacolet, South Carolina, heard his neighbors discussing the subject of Darlington, saying that "Mr. Milliken would not operate a plant under a union." Employee Deaton, of the New Holland, Georgia, mill said that when Darlington closed "* * * nearly everybody it seems like was talking about it."

The record shows that conversations about Darlington between employees, and between employees and supervisors, were commonplace at other mills, and this might well be expected. It was foreseeable because, it is clear, Deering Milliken employees knew that they were Deering Milliken employees, whether their mill be named Monarch or Pacolet or Gainesville. Employee Henderson of the Drayton Mill heard other employees discuss Darlington in 1957 and 1958 "and every time that something would come out in the paper about Darlington"; the employees prophesied that, if they organized, "Deering Milliken" would close Drayton down. Mrs. Lee, a Drayton employee, heard similar conversations about what "Deering Milliken" would do in such circumstances. Mr. Hembree, employed by the Judson Mill, in Greenville, South Carolina, testified that the Darlington closing was talked about "generally" by the employees, "inside and outside" the mill; the employees said that "the Company, the Deering Milliken Company, closed the Darlington plant and they would not hesitate to close Judson Mill if it was organized." In fact, according to Hembree, conversation among employees about Darlington "still goes on." Kirby, an employee of the Gainesville, Georgia, mill, was told by overseer Allen

that if the Union came in at Gainesville, "Mr. Milliken" would shut the plant down. The name "Milliken" was a familiar word on the lips of the employees who testified, and we think it inconceivable that employees in the State of South Carolina, where 20 Deering Milliken mills were located in 1956, would not have made the association between the "Deering Milliken" which terminated Darlington and the "Deering Milliken" which controlled their jobs and futures. We also believe that this likelihood would have been apparent to Roger Milliken. In 1955, to foster the sense of togetherness among Milliken employees, Deering Milliken & Co., Inc., urged the Darlington mill, and, presumably, the other mills, to distribute among their employees a booklet entitled "Fabric Magic by Milliken", which emphasizes the monolithic nature of the Milliken chain and is replete with reference to "Milliken".

The volume of publicity attendant upon the closing was substantial. Many newspapers gave the story close and continuing coverage. Employees also testified to hearing news reports about Darlington over radio and television. We do not share Mr. Milliken's "suprise" at the publicity engendered by the closing. It may be true that there had been a continuous liquidation of textile mills throughout the region in the preceding several years, which had received relatively little publicity, and that Milliken's own experience with liquidations had been similar. Expectably, a recommendation to close a Southern textile mill, made 6 days after the Union won an election there, would have an obvious newsworthiness that would distinguish it from past closings.

Finally, a word is in order about the actual effect of the closing on Deering Milliken employees. Very little effort

was made at the hearing to elicit testimony about the subjective reactions of employees to the news of the Darlington shutdown. The Trial Examiner appeared to feel that the evidence as to effect on employees was deficient because there was no proof that a substantial number of them were, in fact, chilled, and also seemed to regard it as an impossible task to assess the degree of chilling caused by the Closing. TXD, Section VI. As an original matter, the evidence demonstrating that employees frequently discussed the closing, in terms of what it would imply about their own plant if they should organize, would itself seem logically to give rise to an inference that they were adversely affected by it.

But we assume that the Court intends us to apply the usual standard of whether the closing had a natural "tendency to discourage" union adherence in other plants.[25] There is no indication that the Court is requiring a measurement of the quantitative increment of fear created by the Darlington closing, either by itself or as opposed to other mill closings. And we think that little special expertise is needed to evaluate the probable effect of a mill closing, immediately after a union victory, upon those of the mill owner's other employees who hear about it, a substantial number of whom worked only 14 miles away and witnessed, at close hand, the whole process of destruction. We draw upon the record and some of the more undisputed characteristics of human nature to conclude (1) that Roger Milliken could have realistically foreseen that the closing of Darlington, and the sequential relationship of the Union's election to that closing, would be communicated to many of Deering Milliken's employees, who would trans-

[25] *Radio Officers' Union* v. *N. L. R. B.*, 347 U. S. 17, 50-51.

mit the news to fellow employees; (2) that Roger Milliken could have realistically foreseen that a large number of these employees would be cognizant of the fact that they and the ex-Darlington employees shared a common employer, and that this relationship would similarly become known by word-of-mouth to any employees who had not previously been aware of it; and (3) that the closing of Darlington, in the context of a victory by the Union, likely would have, and did have, the effect of discouraging unionism in Deering Milliken's other plants, as was foreseeable.

We have determined then, by application of the terms of the remand setting out the vital requisites of an unfair labor practice in a case of this kind, that such an unfair labor practice was committed. We note the argument that our decision might possibly have been simplified by finding a "future benefit" other than the chilling of unionism, on the theory that, by liquidating Darlington and investing the retrieved capital elsewhere in a functioning textile enterprise,[26] the Millikens achieved a substantial "future benefit" at the expense of unionism while continuing to operate and utilize the Darlington capital within the framework of an employer-employee relationship. We think it too clear to merit discussion that the Court has foreclosed an approach of this sort in this case; it has directed its attention, and ours, explicitly and only to the

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[26]Roger Milliken testified that the Deering Milliken and Cotwool corporation had standing requests from "other manufacturing operations" for capital to invest in new machinery that would earn a higher rate on investment than Darlington had been returning, and that the liquidated capital from Darlington could be used for this purpose. The argument rejected here would consider such employment of capital to be analogous to the technique followed by a "runaway shop".

question of whether there was a purpose of discouraging unionism at other mills.

We find, in conclusion, that such a chilling purpose, at least in part, lay behind the decision to close the Darlington mill; that those exercising control over Darlington, especially in the person of Roger Milliken, had other business interests of sufficient substantially to give promise of their reaping benefits from the discouragement of unionization in those businesses; that the relationship of the persons closing Darlington to the other businesses was such as to make it realistically foreseeable that employees of the latter would fear that their mills also would be closed if they engaged in organizational activity; that the persons exercising control over Darlington did in fact foresee and intend this effect; and that a number of these employees were, in all likelihood, so affected.

Dated, Washington, D. C., June 27, 1967.

FRANK W. MCCULLOCH, *Chairman,*
JOHN H. FANNING, *Member,*
GERALD A. BROWN, *Member,*
SAM ZAGORIA, *Member,*

(SEAL) NATIONAL LABOR RELATIONS BOARD.

STATUTE INVOLVED

The relevant provisions of the National Labor Relations Act, as amended (61 Stat. 136, 73 Stat. 519, 29 U. S. C., Secs. 151, *et seq.*) are as follows:

SEC. 7. Employees shall have the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection, and shall also have the right to refrain from any or all of such activities except to the extent that such right may be affected by an agreement requiring membership in a labor organization as a condition of employment as authorized in section 8(a)(3).

SEC. 8. (a) It shall be an unfair labor practice for an employer—

(1) to interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in section 7;

* * * *

(3) by discrimination in regard to hire or tenure of employment or any term or condition of employment to encourage or discourage membership in any labor organization: * * *

* * * *

(c) The expressing of any views, argument, or opinion, or the dissemination thereof, whether in written, printed, graphic, or visual form, shall not constitute or be evidence of an unfair labor practice under any of the provisions of this Act, if such expression contains no threat of reprisal or force or promise of benefit.

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In the Supreme Court of the United States

OCTOBER TERM, 1968

No. 721

DARLINGTON MANUFACTURING COMPANY, PETITIONER

v.

NATIONAL LABOR RELATIONS BOARD

No. 722

DEERING MILLIKEN, INC., AND DEERING MILLIKEN & CO., INC., PETITIONERS

v.

NATIONAL LABOR RELATIONS BOARD, AND TEXTILE WORKERS UNION OF AMERICA, AFL-CIO

ON PETITIONS FOR WRITS OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

BRIEF FOR THE NATIONAL LABOR RELATIONS BOARD IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals, sitting *en banc,* is reported at 397 F. 2d 760 (Pet. App. 5a–50a). The Board's initial decision and order (J.A. 1–42) [1] and its

[1] "J.A." refers to the portions of the record printed as a joint appendix to the briefs in the court of appeals.

supplemental decision on remand (Pet. App. 41a–84a) are reported at 139 NLRB 241 and 165 NLRB No. 100, respectively.

JURISDICTION

The decree of the court of appeals was entered on May 31, 1968 (Pet. App. 1a–2a), and a petition for rehearing *en banc* was denied on August 29, 1968 (Pet. App. 3a–4a). The petitions for writs of certiorari were filed on November 8, 1968. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

1. Whether substantial evidence supports the finding of the National Labor Relations Board that the Darlington mill, one of several mills owned and controlled by Deering Milliken,[2] was closed for a purpose of discouraging unionism among employees in the other mills of the Deering Milliken enterprise.

2. Whether the Board properly concluded that it was realistically foreseeable that the employees at the other Deering Milliken mills would fear that their mills would also be closed if they engaged in union organizational activities.

3. Whether the Board's reliance on an internal management memorandum and speeches made by the company president was barred by Section 8(c) of the Act.

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[2] The court of appeals held that there was substantial evidence to support the Board's finding that Darlington and Deering Milliken constituted a single employer for purposes of the Act (Pet. App. 14a), and that finding is not challenged here (Pet. in No. 722, n. 5, pp. 5–6).

STATUTE INVOLVED

The relevant provisions of the National Labor Relations Act, as amended (61 Stat. 136, 73 Stat. 519, 29 U.S.C. 151, *et seq.*), are set forth at p. 85a in the Appendix to the petitions.

STATEMENT

A. THE PRIOR PROCEEDINGS

In its initial decision herein (139 NLRB 241; J.A. 1–42), the Board found that Darlington Manufacturing Company had violated Section 8 (a) (1), (3), and (5) of the Act by the retaliatory closing of its textile plant in Darlington, South Carolina, after the employees, in a Board-conducted election, had chosen the Textile Workers Union of America, AFL–CIO as their bargaining representative. The Board also found, *inter alia,* that Darlington had violated Section 8(a)(1) prior to the election by threatening the employees that the plant would be closed down if they chose union representation, telling them that it had been closed for this reason, threatening that union adherents would be blacklisted, supporting a petition disavowing the Union, and coercively interrogating employees. (J.A. 6–7, 18–19.) In addition, the Board found that there was a sufficient degree of common ownership and common control over labor relations and operations to make Darlington, Deering Milliken & Co., Inc., its successor in interest Deering Milliken, Inc., and their other affiliated mill corporations a single employer under the Act. Consequently, the Board held that Deering Milliken was responsible, along with Darlington, for remedying the

unfair labor practices (J.A. 19–30). The Board's order, *inter alia,* directed Deering Milliken to reimburse the discharged employees for wages lost from the time of discharge until they were offered reinstatement or placed on preferential hiring lists at other Deering Milliken mills, to bargain with the Union about reemployment procedures, and to publish and mail to the employees appropriate notices (J.A. 19–33). (No question as to the propriety of the remedial provisions of the Board's order is raised in the petitions.)

The court of appeals, sitting *en banc,* denied enforcement of the Board's order, by a 3–2 vote (325 F. 2d 682). The majority of the court held that the decision to close the Darlington plant was not an unfair labor practice because an employer has the "absolute prerogative" to "go out of business in toto or to discontinue it in part permanently at any time," even if this action is "spurred by unionization" (325 F. 2d at 685–686).

Upon review, this Court agreed that "an employer has the absolute right to terminate his entire business for any reason he pleases," but disagreed "with the Court of Appeals that such right includes the ability to close part of a business no matter what the reason" (380 U.S. at 268). Noting that "a discriminatory partial closing may have repercussions on what remains of the business, affording employer leverage for discouraging the free exercise of § 7 rights among remaining employees," (*id.* at 274–275) the Court held that a

> partial closing is an unfair labor practice under § 8(a)(3) if motivated by a purpose to chill

> unionism in any of the remaining plants of the single employer and if the employer may reasonably have foreseen that such closing would likely have that effect.
>
> * * * * *
>
> If the persons exercising control over a plant that is being closed for antiunion reasons (1) have an interest in another business, whether or not affiliated with or engaged in the same line of commercial activity as the closed plant, of sufficient substantiality to give promise of their reaping a benefit from the discouragement of unionization in that business; (2) act to close their plant with the purpose of producing such a result; and (3) occupy a relationship to the other business which makes it realistically foreseeable that its employees will fear that such business will also be closed down if they persist in organizational activities, we think that an unfair labor practice has been made out. [*Id.* at 275–276.]

"Although the Board's single employer finding necessarily embraced findings as to Roger Milliken and the Milliken family which, if sustained * * *, would satisfy the elements of 'interest' and 'relationship' * * *," the Court concluded that "the Board's findings as to the purpose and foreseeable effect of the Darlington closing pertained *only* to its impact on the Darlington employees" (*id.* at 276). Accordingly, it remanded the proceedings "to afford the Board the opportunity to make further findings on the issue of purpose and effect" (*id.* at 277).

B. THE BOARD'S FINDINGS OF FACT ON REMAND

1. THE PERSONS EXERCISING CONTROL OVER DARLINGTON AND THEIR RELATED BUSINESS INTERESTS

The Darlington mill was the only mill owned by the Darlington Manufacturing Company, a South Carolina corporation. Darlington Manufacturing Co. was one of 17 corporations, operating 27 textile mills, controlled by the Milliken family (Pet. App. 51a–53a, 8a–14a; J.A. 2080–2081, 2085–2087, 23–27). The Milliken family owned a majority of the stock in Deering Milliken & Co. and in Cotwool Manufacturing Company.[3] Through direct stock ownership and the stock held by these two companies the family owned more than 66 percent of Darlington's stock (J.A. 23–24, 234–236, 1292–1300, 1308–1311). Deering Milliken & Co. was the exclusive sales agent and factor for all 27 mills (J.A. 110–111, 1237–1239, 2200–2201). The directors of Deering Milliken & Co.[4] comprised a majority of the directors of Darlington and all but one of the other mill corporations (J.A. 24, 520–521, 1308–1311, 1322). One attorney, J. D. Poag, advised all mills on labor relations (J.A. 2457, 2806, 2812–2815, 2817–2823, 2825, 2827–2836, 3412, 3421), and the different units were operated as one in many other

[3] In 1960, after the commission of the unfair labor practices found by the Board, Deering Milliken & Co. and Cotwool merged and formed Deering Milliken, Inc. In the process, several of Cotwool's former subsidiaries were absolved into Deering Milliken, Inc. (J.A. 1322, 1872–1873, 1884–1885, 2086).

[4] Roger Milliken, Gerrish H. Milliken, Jr. (his brother), Minot Milliken (his cousin), H. A. Hatch (his uncle), and Francis G. Kingsley.

significant respects (J.A. 25–26, 160–161, 174–175, 126, 118, 119, 158–159, 131, 140–148, 156).

Roger Milliken, the Board found (Pet. App. 68a, 47a), "held the obvious position of power in the corporate organization * * *"; he "was manifestly the appointed steward of the Milliken family interests * * *." He was president of Deering Milliken & Co., of Darlington, and of all the other mill corporations except one, where he served as vice president and a director (J.A. 24; 1322, 1341). He approved all capital expenditures for the mill corporations, taking into account the prospective return to the enterprise as a whole (J.A. 559–561, 741–744, 839, 990–994, 1053–1054, 1066–1067, 1083–1085, 1355, 1447–1448, 1501, 1687, 3509, 3510, 3524–3526, 3541, 3558–3562, 2198–2200). He received reports every four weeks from each mill showing, *inter alia,* the number of hours operated each week; man-hour savings achieved; planned or effected abolition of jobs or changes in job assignments; and changes in such working conditions as lighting, ventilation and humidity (J.A. 24, 145; 1694–1699, 1711–1713, 1797–1811, 1824–1859, 1002–1004, 1013–1020, 1033–1034, 1050–1051, 1069–1070, 1072–1073, 1106–1107, 1153–1162). He made detailed proposals and recommendations to his subordinates about such matters as the employment of quality control and engineering personnel; reduction of accidents; tagging machinery with its cost to discourage misuse; use of closed circuit television to eliminate certain jobs; and machinery arrangement to reduce operators' walking distances (J.A. 24; 1026,

327-835—68——2

1047, 1048, 1061, 1073–1074, 1716–1718, 1730–1731, 1735, 1748–1761). His approval was sought before vacation plans were announced, before changes in the employees' group insurance programs were formulated, and before "spare hands" or substitute workers were eliminated (J.A. 1086–1089, 1773, 1409, 1757).

Finally, as shown *infra*, Roger Milliken determined and publicized the employer's policy toward unionization, and implemented that policy by effectuating the liquidation of Darlington immediately after its employees chose union representation. The Board found (J.A. 2091–2092) that "to Roger Milliken the Union victory at Darlington had substantial implications for the 26 other mills * * *"; it was "a portent of other union victories in the other [non-unionized] plants, if permitted to go unchallenged. * * *"

2. THE ANTI-UNION CAMPAIGN AT THE DARLINGTON MILL, AND THE CLOSING OF THAT MILL WHEN THE EMPLOYEES SELECT A UNION REPRESENTATIVE

In March 1956, the Union began an organizational campaign among the employees at the Darlington mill (J.A. 4, 2080; 250, 2159). Roger Milliken was promptly advised of this activity by mill treasurer (and director) Oeland (J.A. 2159). Milliken requested Attorney Poag to "spend time down there," and Poag thereupon took charge of the campaign in opposition to the drive (J.A. 421–422, 2841–2842). As the court of appeals stated (Pet. App. 13a): "In opposing union organization at Darlington, Poag reflected Milliken's policy for all mills, not just Darlington." Poag conducted approximately three to five

meetings with Darlington's supervisory personnel (including "overseers" and "second hands"), instructing them "how they were to talk to the people" (J.A. 2805, 2825–2827, 2839–2840, 3412–3413). According to mill treasurer Oeland, Poag told the supervisors that, although "Mr. Milliken had not said what he would do [if Darlington were organized], * * * other mills had closed down where Mr. Milliken had tried to operate with a union" (Pet. App. 16a, n. 17; J.A. 3405, 3412). As the court below noted: "The supervisors understood the message. The record discloses numerous instances in which they told employees that Milliken had closed other mills because of unionization and that he would do the same at Darlington" [5] (Pet. App. 16a; J.A. 4, 6-7, 25, 322–323, 325–327, 330–331, 334–339, 343–346, 350, 354–357, 361–363, 366, 370, 384).

On September 6, 1956, the Union won a Board-conducted election by a narrow margin (J.A. 4; 250–251). Immediately thereafter, both Oeland and Poag so informed Roger Milliken by telephone (J.A. 279). On the following day, Roger Milliken decided to recommend that Darlington be shut down (J.A. 4, 263, 1092). He testified (J.A. 457, 422–423, 464, 472, 476–477) and Darlington conceded before the Board (J.A. 8, n. 15), that the election results played a substantial part in the decision to close the mill. As Roger Milli-

[5] At the same time, management posted on the plant bulletin boards posters depicting a closed plant and containing, *inter alia*, the caption: "The records prove that the TWUA-CIO has caused many textile mills to close, ending jobs and bringing hunger and privation to people who want to work * * *" (J.A. 7, n. 13; 1255, 75–76).

ken put it (J.A. 457), "* * * the people in electing a union indicated an unwillingness to cooperate."

Roger Milliken called a special meeting of the Darlington board of directors for September 12, but advised only those directors who were members of his family that his intention was to close the mill (J.A. 57; 280–281, 424–426, 3105–3106).[6] The meeting, which also discussed a number of other matters, lasted only 75 minutes; the board unanimously approved a resolution to liquidate Darlington and to call a special meeting of the stockholders to approve the proposal (J.A. 5; 431, 1256–1261, 281–282, 448).[7]

Immediately afterwards, Oeland gave various Darlington supervisors "the words of Mr. Milliken and others regarding the reason for liquidation," and told them to advise their subordinates of the directors' rec-

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[6] Director Oeland explained (J.A. 3421–3422):

> * * * During the early part [of the directors' meeting], Mr. Milliken took me into a room to myself. * * * He told me he was going to suggest to the directors that they recommend * * * Darlington be liquidated * * *. I said, Mr. Milliken, actually there are a lot of people loyal to you at Darlington, as the vote would indicate. Do you think it is right not to give them a chance to see if we could operate the mill * * *. [Roger Milliken] said that the people had had that chance during the election * * *.

Directors Lyles and Nicholson were first told the purpose of the meeting after Oeland was taken "into a side room and talked to" by Roger Milliken (J.A. 3105–3106, 3457–3476).

[7] At no time during this brief meeting did the directors specifically ask what the Union's economic demands were (J.A. 3423, 460–461, 2706–2707, 2746–2747, 3464–3465); indeed, the Union had not made any specific demands (J.A. 460–461). As counsel for the employer conceded before the Board (J.A. 2714): "* * * We have no problem of what the Union was asking of management in this case."

ommendation (J.A. 491–492). In relaying Oeland's message, many supervisors attributed the closing of the mill to the Union's election victory, and to the decision of Roger Milliken (J.A. 5, n. 10, 6; 351–353, 327, 320, 359, 306, 309–311, 344, 357, 366–367, 370, 374, 380, 482, 3193–3201).[8] Oeland testified that the following "Bulletin," appearing in the September 13 edition of the Darlington News and Press, "correctly reflect[ed] what had happened" (J.A. 3424–3425, 3733):

> A meeting of stockholders of Darlington Manufacturing Company has been called for October 17 * * * to decide whether to close the local cotton mill or continue its operation. * * * The news and press was advised of the meeting early Wednesday afternoon via telephone conversation with James M. Oeland * * *. *It was reported that the Deering-Milliken textile chain has closed two or three mills which voted for union representation. Its only unionized plant, a unit in Maine, was recently shut down.* [Emphasis added.]

On October 17, 1956, Roger Milliken opened the stockholders' meeting with the statement "that on September 6, when [the employees] voted for a union * * * he decided to close the mill" (J.A. 5; 263, 292, 1262–1265). He then voted all the shares he held in person and by proxy—which included not only the 6 percent owned by him and his immediate family, but the 59 percent owned by Deering Milliken & Co. (41

[8] The supervisors stated, for example, "* * * I told you damn Union people if you all voted the Union in he would close the plant down. * * * Roger Milliken is not going to run a plant with the Union * * *" (J.A. 351–352).

percent) and Cotwool (18 percent)—in favor of liquidation (J.A. 1292–1300, 438, 494–495). When asked why he was closing the mill even though "83 percent of the people have signed a petition to go back to work whether they have a union or not", he replied, "As long as there are 17 percent of these hard core labor people here, I refuse to run the mill" (J.A. 5; 266, 268). He also issued a news release (prepared prior to the stockholders' meeting) which announced the decision to liquidate and the sale of the plant at auction "at the earliest possible opportunity * * *" (J.A. 454, 458, 1270–1271, 3312, 3317).

After the September 12 board of directors' meeting, Darlington refused to accept any new orders for textiles (J.A. 6; 282–283, 928, 933–934, 941–943, 950, 955–956, 1788–1789, 2263–2268). As the existing work ran out, the Darlington employees worked shorter and shorter hours, and were gradually discharged; the mill was finally closed in November, and its assets were sold piecemeal at public auction on December 12 and 13, 1956 (J.A. 6, 11, n. 22; 284–291).

3. THE DARLINGTON LIQUIDATION BECOMES AN "OBJECT LESSON" FOR THE REMAINING DEERING MILLIKEN EMPLOYEES

On November 14, 1956—one month prior to the piecemeal auction of Darlington—Roger Milliken forwarded to the treasurers of a number of Deering Milliken mills, and to certain officials and employees of the related Deering Service Corporation, the following (Pet. App. 59a–64a; J.A. 2094–2097, 2101, 3548–3556, 968–982; and see J.A. 2767–2768, 3633–3635): (1) copy of a news article excerpted from the South Carolina

State Chamber of Commerce "Newsletter" of October 1956; (2) reprint of an article and editorial which had appeared in the November 8, 1956 edition of *America's Textile Reporter,* a trade magazine; and (3) a covering memorandum by Milliken.

The "Newsletter" article stated, *inter alia,* that a Massachusetts mill executive had "notified the mill's 300 employees last week that the plant would be closed permanently" because, "since the signing of a labor contract last February, the union has kept the mill in a state of turmoil and reduced efficiency and production to the point that the owners were convinced the mill had no future and investment of further funds were not justified * * *" (J.A. 3555–3556). The *Textile Reporter* article bore the headline "Darlington Situation Becomes Object Lesson To All Concerned," and the subheadline "Present Stepped-Up Union Activity in South Harbinger of Stronger Efforts and More Exaggerated Promises to Come" (J.A. 3549–3554). It described the economic distress of the City of Darlington, and added that the employees who voted against the Union would have to "suffer" along with those who voted for it (J.A. 3552). The editorial accompanying this article stated, *inter alia* (J.A. 3554–3555):

> If the people of Darlington knew anything of the Deering Milliken record, they would know that management * * * has [not] intended to share the prerogatives of management with labor union leaders. This has been the case through three generations of Milliken opera-

> tions. When the Madison Woolen Mills of Madison, Maine, became not only unprofitable but unionized Mr. Gerrish Milliken liquidated it * * *. When the Dallas Manufacturing Co. at Huntsville, Alabama, became unionized, the Millikens liquidated it, contrary to the opinion of many local people that such would not be the case. We ourselves are small shareholders in Darlington and from experience and acquaintanceship, we knew the minute the union election vote was announced that we would receive a call for a special meeting to vote for liquidation.

The memorandum which Roger Milliken sent with the above enclosures told his mill executives (J.A. 3548–3549):

> * * * The unions are going to be making a tremendous drive all through this area, and there are few things that are more important to us than making sure that the leaders in your community understand and are sympathetic to what you are trying to do.[9]

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[9] Roger Milliken had voiced similar sentiments in two speeches which he made several months before the Union campaign at Darlington started (Pet. App. 53a–59a; J.A. 2088–2092, 3621–3633, 2650–2676). In the speeches, he indicated that he regarded anticipated union organizational drives as a threat to the Southern industrial community; gave numerous examples where employers, including Deering Milliken, had refused to build or maintain factories in areas with "organized unions"; cited the liquidations of "three [Deering Milliken] textile plants—two in Maine [*i.e.*, Madison and Lockwood mills] and one in Alabama [*i.e.*, Dallas Manufacturing Co.]", and, by comparison, observed: "* * * last week we bought a plant in Maine [*i.e.*, Amerotron]. It is not organized * * *" (*ibid.*). As we show *infra*, pp. 23–24, the Board looked "to Milliken's [two] speeches not simply as proof that he closed Darlington because of the Union (a settled

Roger Milliken also prepared news releases on the Darlington liquidation, for he wanted "to have newspapers running a story on the action of the stockholders * * *"[10] (J.A. 3309–3312, 3335–3337). His "office" received "copies of the various newspaper reports, newspaper stories concerning the proposed liquidation of Darlington" (J.A. 3335–3336, 3344–3346, 3358–3359). He maintained a scrapbook containing the newspaper clippings "that were sent to us or were extracted from newspapers during the period that the affairs of [Darlington] were in the papers" (J.A. 1091–1092, 982–983).

The hearing on remand revealed that Deering Milliken supervisory and non-supervisory personnel at the remaining plants were fully aware of the Darlington liquidation (J.A. 2113–2116). Thus the superintendent of Deering Milliken's Hartsville mill, located in a town 14 miles from Darlington and served by the same local newspapers (J.A. 2114), acknowledged that the Darlington organizational campaign was discussed by the "people" at the Hartsville mill, "before the election" and "after the election" (J.A. 2114; 3129–3130, 3138, 3139–3146). The Hartsville mill's treasurer attended the Darlington auction; and he read Roger Milliken's memorandum, enclosing, *inter alia*, the *Textile Reporter* article and the editorial set forth *supra*, p. 13 (J.A. 2114; 3203, 3204–3205, 3208, 3230–3233,

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matter, we believe), but as evidence of both his apprehension of an anticipated large-scale union campaign and of his belief that an industry-wide response was imperative * * *" (Pet. App. 59a).

[10] It was stipulated that there was "widespread publicity" attending the unionization and prompt liquidation of Darlington (J.A. 2800, 3092).

3241). He testified that the Darlington events "were common knowledge all over the plant"; that the Hartsville Chamber of Commerce, of which he was a member, had petitioned the employer not to close the Darlington mill; that the "thought probably occurred to" him that the Union might attempt to organize his mill, but, at that time, he had "no labor problems" like Darlington because his "people were very loyal" (J.A. 2114; 3230–3231, 3234, 3235–3236). Hartsville employee witnesses confirmed that Darlington was a constant subject of discussion at that mill (J.A. 2114; 2604–2614, 2616–2617, 3138–3142, 2408–2417, 2337–2343, and see, J.A. 2310–2329). As one former Hartsville employee explained: "there was talk about a union" (J.A. 2114); the subject of Darlington was frequently discussed among the employees from 1956 on (J.A. 2411–2412); "the discussions would be about organizing and helping the union's coming in and what would happen * * *" (J.A. 2114; 2411–2412). Conversations about Darlington between employees and supervisors were commonplace at the employer's other mills; such discussions included the warning that the other mills would be closed down, like Darlington, if they were organized (J.A. 2115; 2421–2424, 2425–2429, 2429–2434, 2917–2920, 2560–2574, 2579–2580, 2482–2486, 2495, 2512–2522, 2795–2799, 2864, 2866–2867, 3015, 2635–2638, 3611–3615).

C. THE BOARD'S CONCLUSIONS

The Board reaffirmed its earlier finding that Darlington, Deering Milliken, and the latter's other mill corporations all constituted a single employer for

purposes of the Act; it also found that the "'persons exercising control over' Darlington (*i.e.*, the Milliken family, as advised and influenced by Roger Milliken) had interests in other businesses 'of sufficient substantiality to give promise of their reaping a benefit from the discouragement of unionization' in those businesses" (Pet. App. 52a). Moreover ,the Board found that, "when Roger Milliken acted at Darlington, his concern transcended the fate of the Darlington mill alone, and encompassed as well the future of all the mills with which he was connected." It concluded that "the closing of Darlington was, at least in part, the product of a desire to discourage unionism among employees at other Deering Milliken mills" (Pet. App. 66a–67a).[11] Finally, the Board found that "the relationship of the persons closing Darlington to other businesses was such to make it realistically foreseeable that the employees of the latter would fear that their mills also would be closed if they engaged in organizational activity" (Pet App. 84a). Accordingly, the Board reaffirmed its prior order.[12]

D. THE DECISION OF THE COURT OF APPEALS

The court of appeals, sitting *en banc,* enforced the Board's order in full. The court held "that the evi-

[11] The Board, in its first decision, had found that "the decision to close the mill was not in fact based on economic factors," and "would not have been made but for the protected organizational activities" (Pet. App. 48a–50a; *supra*, p. 3).

[12] The trial examiner had made contrary findings on these issues, but the court of appeals concluded that they were "of insufficient force to destroy the substantiality of evidence upon which the Board's decision rests. *Universal Camera Corp.* v. *NLRB*, 340 U.S. 474, 493 (1951)." (Pet. App. 7a, n. 4.)

dence considered as a whole supports the Board's single employer finding, which in turn satisfies the elements of 'interest' and 'relationship,' " required by this Court's earlier decision (Pet. App. 14a). Moreover, the court held that there was sufficient evidentiary support for the Board's finding that, in closing Darlington, "the employer was actually motivated, at least in part, by a purpose to chill unionism in other Deering Milliken mills" (Pet. App. 25a). Finally, the court sustained the Board's finding that it was realistically foreseeable that employees of other Deering Milliken mills would fear that their mills would be closed if they engaged in similar organizational activity (Pet. App. 25a–29a).

ARGUMENT

The court of appeals correctly concluded that the Board properly applied the principles delineated in this Court's prior decision remanding the case, 380 U.S. 263, and that the Board's findings are supported by substantial evidence on the record as a whole. There is thus no occasion for further review.

1. Petitioner Deering Milliken contends (Pet. in No. 722, pp. 7–10) that the Board's unfair labor practice finding is vulnerable because the Board failed to find that the employer's purpose to chill unionism among its remaining employees was "the moving cause, a substantial cause, or the immediate cause" of the Darlington closing. This assertion, however, impermissibly melds the associated but distinct principles which this Court indicated to be applicable to this case on remand.

As this Court recognized, and the court of appeals found to be substantially supported in its review on remand, the Board found that anti-union animus rather than an economic motive was "the moving cause, a substantial cause or the immediate cause" of the Darlington closing. 380 U.S. at 267, Pet. App. 24a and n. 26. The requirement of such a holding is the most that can be ascribed to the cases which Deering Milliken cites in its petition (p. 9 and nn. 10-11); in each, the Board was required to distinguish between a purely economic motive—for example, discharge "for cause"—and a motive to damage the union. In the peculiar circumstances of the present case, however, this Court held that the finding of the latter motive did not suffice; for, if the employer were going out of business entirely, it did not matter what his anti-union purpose was. His purpose could become significant only if the closing were partial, for then the employer might expect and intend (in part) to achieve future benefits in combatting unionization. 380 U.S. at 273, n. 19.

Once it is decided that anti-union animus was the moving, substantial or immediate cause of a partial closing, and that the closing was "motivated by *a* purpose to chill unionism in any of the remaining plants" (*id.* at 275; emphasis added), there is no reason to require, further, that the latter purpose, rather than that of retaliation against the union, predominated. For a purely economic motive for the action has already been ruled out. Indeeed, this Court, like the court of appeals (Pet. App. at 24a), recognized that the two anti-union purposes were not mutually exclusive when

it noted that "the Board's findings as to the purpose and foreseeable effect of the Darlington closing pertained *only* to its impact on the Darlington employees. No findings were made as to the purpose and effect of the closings with respect to the employees in the other plants comprising the Deering Milliken group." It thus left open for consideration on remand "a showing of motivation which is aimed at achieving the prohibited effect." 380 U.S. at 276. There is no suggestion in this language that the Board had also to find, as petitioners suggest, that the motivation to "chill" was predominant *over the retaliatory motive—i.e.,* was the moving substantial, or immediate cause—in the case as a whole.[13] The Board, responding to this Court's suggested inquiry, found with the substantial record support detailed above that "such a chilling purpose, at least in part, lay behind the decision to close the Darlington Mill" (Pet. App. 53a–76a, 84a). As the court of appeals correctly held, "[it] was sufficient for the Board to find that the election of the union was a substantial cause of Darlington's closing and that the employer was actually motivated, at least

[13] Petitioners' contention is undercut by this Court's discussion of *National Labor Relations Board* v. *Savoy Laundry, Inc.*, 327 F. 2d 370 (C.A. 2) and *National Labor Relations Board* v. *Missouri Transit Co.*, 250 F. 2d 261 (C.A. 8) at p. 273, n. 19 of its *Darlington* opinion. In both cases, an employer had terminated a part of his operations; although it was clear that his purposes included the discouragement of union activity among his remaining employees, there was neither finding nor suggestion that that was his predominant purpose, overall.

in part, by a purpose to chill unionism in other Deering Milliken mills" (Pet. App. 24a–25a).

2. Petitioners further contend (Pet. in No. 721, pp. 11–12, 13–19; Pet. in No. 722, p. 2, n. 4) that the Board improperly relied upon the motive of a single Darlington officer and director, Roger Milliken, in finding an unlawful purpose. This contention rests on a premise—*i.e.*, "Roger Milliken alone did not exercise control over the closing of Darlington and the Board does not find that he did" (Pet. in No. 721, p. 15)—that is contrary to the Board's explicit findings and the evidence in the record. Thus, the Board found, and the evidence summarized in the Statement affords ample support for the finding, that: "[T]he critical purpose is the one which moved Roger Milliken. He held the obvious position of power in the corporate organization, he convened the [directors'] meeting, he offered the resolution, and he advised why the resolution should be accepted. The other [three] Millikens were only tangentially related to the manufacturing operation. Gerrish Milliken, brother to Roger Milliken, was involved in the sales section of Deering Milliken, and had been elected to the Darlington board an hour before he voted to recommend liquidation of the plant; Minot Milliken, Roger Milliken's cousin, was the New York-based treasurer of Deering Milliken, whose prior experience had been in the woolen sales end of the operation; Harold Hatch, an uncle by marriage of Roger Milliken, * * * was in semi-retirement in Connecticut. * * * . According to Milliken, the three local directors [Oeland, Nichol-

son, and Lyles] were not even told prior to September 12 what the purpose of the meeting was to be" (Pet. App. 68a–69a). In these circumstances, the court of appeals properly sustained the Board's reliance "on Milliken's motive," because the "record shows that Milliken interests controlled Darlington and that Roger Milliken occupied a dominant role in the management and control of these interests" (Pet. App. 23a).

3. Petitioner Deering Milliken errs in contending (Pet. in No. 722, pp. 10–12) that the Board was required to establish that the employees at the other Deering Milliken mills were in fact "chilled" by the Darlington closing. Although this Court stated that it was not sufficient "to argue that the Darlington closing necessarily had an adverse impact upon unionization in such other plants," it added: "We have heretofore observed that employer action which has a foreseeable consequence of discouraging concerted activities generally does not amount to a violation of § 8 (a)(3) in the absence of a showing of motivation which is aimed at achieving the prohibited effect" (380 U.S. at 276). As the court of appeals correctly understood, these statements, read together, require only that there be specific proof of "the employer's subjective motive, interest or purpose to chill unionism elsewhere—which has been shown" (Pet. App. 28a–29a); they do not require the Board to engage in a subjective probing of the minds of the employees at the other mills, a kind of inquiry heretofore deemed improper (see Pet. App. 29a, n. 33). All the Court's

opinion demanded on this point was a showing—which the Board made here—that it was "*realistically foreseeable* that * * * employees [in the other related business] will fear that such business will also be closed down if they persist in organizational activities" (380 U.S. at 276, emphasis added).

4. Finally, there is no merit to petitioner Deering Milliken's contention (Pet. in No. 722, pp. 12–16) that the Board's reliance upon Roger Milliken's November 14, 1956 memorandum with attachments (*supra,* p. 14) and his two earlier speeches (n. 9, *supra*) was contrary to Section 8(c) of the Act.[14] The former was received into evidence *without objection* early in the Board proceedings (J.A. 968–969). The Board, in its first decision, found that Roger Milliken "circulated [the] memorandum and editorial as a primer to the managers of the mills in combatting unionization" (J.A. 25).[15] On remand, the Board found that these materials showed the "direct relationship between the closing of Darlington and Milliken's serious concern with the union threat to all of

[14] Section 8(c) provides that "The expressing of any views, argument, or opinions * * * shall not constitute or be evidence of an unfair labor practice * * * if such expression contains no threat of reprisal or force or promise of benefit" (Pet. App. 85a).

[15] As shown *supra*, p. 14, the memorandum conveyed to the managers of Roger Milliken's other mills his concern that "the unions are going to be making a tremendous drive all through this area"; warned them of the Milliken reputation for closing unionized mills; and directed the managers to "make sure the leaders in your community understand and are sympathetic to what you are trying to do."

his textile mills" (Pet. App. 59a), and amounted to instructions to the other mill officials to advise community leaders "that the mill might no longer be in that community, if the employees chose to unionize" (Pet. App. 62a). In these circumstances, the court of appeals properly held that the memorandum and enclosures were not privileged "views, argument, or opinion" under Section 8(c) (Pet. App. 19a–20a).[16]

Similarly, the Board's reliance upon Roger Milliken's two published speeches was not improper. As the court below noted (Pet. App. 20a–21a), the "Board carefully limited its consideration of these speeches" to " 'clarify the scope and breadth of the antiunion considerations which led to the Darlington closing.' " Section 8(c) "did not prohibit the Board from considering the speeches for [these] purposes"; and, in any event, the "speeches revealed nothing of substance not shown by other evidence"—they "neither add to, nor detract from, the evidence necessary to support the Board's decision" (*ibid.*).

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[16] As Senator Taft explained, "in order to make clear the legislative intent" of Section 8(c) (2 Leg. Hist. of the Labor-Management Relations Act, 1947, p. 1541 (1948)): "this subsection * * * does not cover instructions, directions, or other statements which might be deemed admissions under ordinary rules of evidence * * * this section does not make incompetent, evidence which would ordinarily be deemed relevant and admissible in courts of law." The propriety of the Board's use of "noncoercive" statements to assess purpose, motive, or intent is well settled. See, *e.g.*, *Hendrix Mfg. Co.* v. *National Labor Relations Board*, 321 F. 2d 100, 103–104 (C.A. 5); *Int'l Union, United A., A. & A. Imp. Wkrs.* v. *National Labor Relations Board*, 363 F. 2d 702, 707 (C.A.D.C.), certiorari denied, 385 U.S. 973.

CONCLUSION

The petitions for writs of certiorari should be denied.

Respectfully submitted.

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